THE
INDIAN LAW REPORTS
Allahabad Series

Containing Cases determined by the High Court at Allahabad and by the Supreme Court of India on appeal therefrom

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1961

Volume I

JANUARY—JUNE

ERRATTA

On page 678, in the head-note in paragraph 3 (beginning from the word *obiter*, *read* 'or' *for* 'of'

On page 678, in the head-note in paragraph 5 (beginning from the words 'Per LAL, J') in the second line, *read* 'on' *for* 'an'

On page 710, in the head-note, *read* 'January 10' *for* the words 'November 1.' on the margin

JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD

1961

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Retired on 16th February 1961)

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(Acting from 17th January 1961
confirmed on 17th February 1961)

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TABLE OF CASES REPORTED

SUPREME COURT

APPELLATE CIVIL

	Page
Akshaibei Lal, Dr *v.* Vice-Chancellei, Banaias Hindu University	710
Diamond Sugai Mills Ltd *v* State of Uttar Pradesh	573
State of Uttai Pradesh *v.* Babu Ram Upadhya	509
State of Uttai Pradesh *v* The Basti Sugai Mills Co Ltd	384
The District Board, Ghazipui *v.* Lakshmi Naiain Sharma	373

APPELLATE CRIMINAL

Bhagwati Saian *v.* State of Uttai Pradesh	740
P C. Joshi *v.* State of Uttai Pradesh	361
Padam Sen *v.* State of Uttar Pradesh	352
Sarjoo Prasad *v* State of Uttar Pradesh	603
Surajpal Singh *v* State of Uttar Pradesh	565

HIGH COURT

APPELLATE CIVIL

Azim Uddin Ashraf Chaudhri *v.* Municipal Board, Bara Banki	988
Badri Prasad *v* Jagannath	308
Chandrawati Tewari *v* Uttai Pradesh Government	141
Dwarkanath Munshi *v.* Gayatri Devi	678
Kundan Lal *v* Union of India	169
L C Agarwal *v* Municipal Board, Hapur	732
Majeed Uddin *v* Syed Ghulam Hasnain Naqvi	300
Mohammad Habibur-Rahman Khan *v.* Abdul Qadir Faruqi .	17
Mohammad Luqman Sharif *v.* State Transport Authority Tribunal, Lucknow	201
Paras Ram *v* Srimati Janki Bai *alias* Savitri	932
Regional Transport Authority, Gorakhpur *v* Kashi Prasad Gupta	52
Srimati Buchunia *v* Sub-Divisional Magistrate	674

Page

State of Uttar Pradesh *v.* His Highness Maharaja Brijendra Singh . .. 236
State of Uttar Pradesh *v* Sudarshan Deo .940
U P State *v* Murtaza Ali . .. 767
Vikrama Singh *v* Srimati Parbati Kunwar 126
Wahid Husain Syed *v.* Maharaj Kumar Mahmud Hasan Khan . 1

CIVIL REVISION

Malik Nizamuddin *v* Sheo Prakash 223
Shyam Sunder Lal *v.* Lakshmi Narain Mathur .. 834
Sri Ram *v* Gauri Shanker . 287

CIVIL MISCELLANEOUS

Ghulam Mohiuddin *v* Munsif, Etah . 181
Jugal Kishore *v* The Wealth Tax Officer Special Circle 'C' Ward, Kanpur 785
Jwala Prasad *v* Jwala Bank Ltd 399
Krishna Chandra Gupta *v.* Prayag Narain 252
Messrs Naini Tal Bank Ltd *v* The Commissioner of Incometax, U P and V P. .. . 920
Messrs Permanand Tek Chand *v* Collector of Customs and Central Excise, Allahabad . . 321
Mubarak Ali Khan *v* Land Management Committee, Akoharia 26
The Agra Bullion Exchange Ltd., Agra *v.* Commissioner, Incometax 243

APPELLATE CRIMINAL

Budh Sagar *v* State 416
Chhiddi *v* State 609
Rajit Ram *v* State . 851
State *v* Ashanand Kurmi 758
State *v* Ram Dayal . . 293
State *v* Yaqub .. 215

CRIMINAL MISCELLANEOUS

Prabhu Narain Singh *v* Superintendent Central Jail, Varanasi 327
Raj Narain *v* State . 33
Ram Abhilakh *v.* State . . 269
S N Tangri *v* State 315

INDEX

	Page
Acts—(*Indian*).	
Code of Civil Procedure, 1908, ss. 47 and 60	141
———ss 75 and 151, O. XXVI, O XXXVIII, r 5, O XXXXI, r. 7(1)(*b*), O. XL, r. 1	352
———s. 102 . .	287
———ss 114, 117, O. XLVII	399
Code of Criminal Procedure, 1898. ss. 46, 80	315
———ss. 173 and 117	758
———ss 198 and 198-B	361
———s 491 . .	427
———ss 520, 423 (1)(*d*), 517, 439 (1) (4) (5)	269
Constitution of India, 1950, Arts 14, 19 cl (1)(*g*) and (6)	384
———Art. 19 . .	33
———Art 19(1)(*g*)	740
———Art 20(3) .	851
———Arts. 21, 22 and 226	417
———Art 22	315
———Art 31-B	236
———Arts. 154, 309, 310, 311	509
———Art 226	52, 252, 674 ,732, 949
———Art 226, 19 (1) (*f*) (*g*) and 31	321
———Arts 248, vii Sch. List I Entries no 86 and 97	785
———Seventh Sch. List II Item 52	573
Criminal Law Amendment Act, 1932, s 7	33
Essential Commodities Act, 1955, ss. 7 and 11	758
Essential Supplies (Temporary) Powers Act, 1946 s. 11	749
Foreigners Act, 1946, ss. 2, 14 .	215
Foreigners' Laws (Amendment) Act, 1957, s 2	215
Foreigners' Order, 1948, para 7	215
Government of India Act, 1935, s 241 (4)	169
Hindu Law of Inheritance (Amendment) Act, 1929	126
Hindu Marriage Act, 1955, ss. 10 and 24	932

Page

Indian Arbitration Act, 1940, s 29 1
Indian Income Tax Act, 1922, s 4(3)(i) 243
Indian Income Tax Act, 1922, s. 10(1) 920
Indian Partnership Act, 1932, s. 69(3) 1
Indian Penal Code, 1860, ss 21, Exp. 2 and 165-A 352
———ss. 218 and 466 851
———s 302 609
———s 395 293
Indian Railway Establishment Code, rules under 169
Iron and Steel Control of Production and Distribution Order, 1941, cl 10-B 740
Land Acquisition Act, 1894, s 18 988
Limitation Act, 1908, s 22 126
Motor Vehicles Act, 1939, ss 2 21), 44, 48 and 64 201
———Chs IV, IV-A, ss. 43, 47, 48, 68(*c*), (F), (G) 52
Motor Vehicles Rules, r. 72(*a*) 201
Paddy (Restriction on Movement) Order, 1958, s. 3 738
Payment of Wages Act, 1936, ss 7(2)(*h*) and 15 169
Police Act, 1861, s. 7 509
Prevention of Corruption Act, 1947, s 5 365
Prevention of Food Adulteration Act, 1954 ss 2(xiii) 7 and 16 603
Preventive Detention Act, 1950, s 3(A)(ii) 315
———ss 3, 7 and 9 427
———ss 5(1)(*d*) and 5(2) 416
Sea Customs Act, 1878, s 178-A 321
Transfer of Property Act, 1882, s. 106 678
Wealth Tax Act, 1957, s 3 785
———(*Local*)
Banaras Hindu University Act, 1915, s 5(2) 710
Banaras Hindu University (Amendment) Act, 1958 s. 19-A. Order no. 6 Item no 30 710
Court Fees Act, 1870 (as amended by and in its application to Uttar Pradesh) s 7 (iv-A) 17
High Court Rules, 1952, r 6 ch viii ... 308
Letters Patent (High Court of Judicature, Allahabad) 1866, cl. 10 399
Police Regulations, para 486 509
Regulation under notification no. 6471/XI—226-46, dated 9th November, 1946 ... 732 767

Page

U P (Temporary) Control of Rent and Eviction Act, 1947, s 3 678
———ss 7(1)(c), 7-A (1)(2), 7(2) and r 4 under s 17 831
———s 53(1) 300
U P District Boards Act, 1922, ss 91, 106 and 174(2)(k) 373
U P. General Clauses Act, s 16 732
United Provinces High Courts Amalgamation) Order 1948, cl 7 399
United Provinces Industrial Disputes Act 1947, s 3 cl (b) and (d) 381
United Provinces Land Acquisition Rehabilitation) Act, 1948, s 11(1) Proviso 286
United Provinces Land Tenure (Legal Proceedings) (Removal of Difficulties) Order, 1952, paras 2 and 3 223
U P Municipalities Act 1916, s 69-A (4) 732
———s 87-A 181
———s 87-A (3) (4) (5) 252
———s 297 767
U P Municipalities (Amendment) Act, 1953 s 38(2) 767
United Provinces Panchayat Raj Act, 1947 ss 15, 11, 37(d) and 111 373
———s 83 rules under 674
U P State Road Transport Service (Development) Rules, 1958 rr 4(1) and 10 52
U P Sugarcane Cess Act, 1956, s 3 573
United Provinces Tenancy Act, 1939, ss 168 and 251 223
U P Town Areas Act, 1914, sub-s (1) (3) and (4) 181
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1951 ss 7, 153, 166, and 200 223
———s 117 26
U P Zamindari Abolition and Land Reforms Rules 1952, r 115 sub-rr C, D, F and G 26

Actual date of order, if to be included in computing the period of "Twelve days" provided in s 3(3) of the Preventive Detention Act 457

Cess *on entry of sugarcane into the premises of a factory—Competence of State Legislature to impose—Interpretation of Statutes—Rules on—U P Sugarcane Cess Act,* 1956, *s* 3—*Constitution of India,* 1950 *Seventh Schedule, List II, Item* 52

Page

The U P Sugarcane Cess Act, 1956, replacing the earlier enactments on the subject authorizing imposition of cess on entry of sugarcane into the premises of a factory is beyond the legislative competence of the State and, therefore, invalid because it is not covered by or consistent with Entry 52 of the State List—Taxes on the entry of goods into a local area from which alone the power in question may admittedly be derived

In adjudging the scope of the entry aforesaid or the meaning of the words 'local area' therein, the following rules of interpretation may be kept in view.

(i) there is a presumption in favour of constitutionality which, however, must be balanced between, on the one hand, the statutory rule that words conferring the power of legislation should be interpreted liberally and the powers conferred should be given the widest amplitude and, on the other, the rule of caution that the courts cannot, in their anxiety to preserve the power of legislature, extend the meaning of the words beyond their reasonable connotation,

(ii) in construing the meaning of the words used in a statute it is legitimate to have recourse to the terms and history of the previous legislation on the subject along which the Legislature must be presumed to have proceeded in framing its statute,

(iii) it is true that when words and phrases previously interpreted by the courts are used by the Legislature in a later enactment replacing the previous statute, there is a presumption that the Legislature intended to convey by their use the same meaning which the courts had already given to them. This presumption can however only be used as an aid to the interpretation of the latter statute and should not be considered to be conclusive The presumption will be strong where the words of the previous statute have received a settled meaning by a series of decisions in different courts of the country, and particularly strong when such interpretation has been made or affirmed by the highest court in the land The presumption will, on the other hand, be naturally much weaker when the interpretation was given in one solitary case and was not tested in appeal;

(iv) the courts cannot re-write the law for the purpose of saving a portion of it. Nor is it for the Court to offer any suggestion as to how the law should be drafted in order to keep it within the limits of legislative competence.

Page

The proper meaning, therefore, to be attached to the words 'local area' in entry 52 of the State List in the Constitution (when the area is part of the State imposing the law) is that it is an area administered by a local body like a municipality, a district board, a local board, a union board, a Panchayat or the like The premises of a factory is not a 'local area' as such and the entry of goods into the same cannot, therefore, be taxed.

(*Per* AYYANGER, J., *contra*) The term 'local area' has no doubt the meaning attached to it by the majority judgment The real vice of the charging section 3(1) in the Act, however, rests not in that it confines the levy to entry of cane in the premises of a factory but in equating the premises of a factory with a local area The power does extend to taxing entry of goods from one local area to another and, in actual exercise of power, this need not extend or apply to all entries but may be limited to entries from one local area to the premises of a factory in another local area The limitation on the power is that movement of goods in one and the same local area cannot be taxed The charging section would, therefore, be *ultra vires,* only in so far as it includes or allows a levy on cane entering a factory from within the same local area in which the factory is situate and that for all other cases the Act would be good and those would be validly leviable It would be in consonance with the canons of interpretation to read the impugned section accordingly

Diamond Sugar Mills Ltd *v* State of Uttar Pradesh 573

Agriculturist—Defined and explained 141

Amount for charity—Portion of company's receipts on account of and earmarked for charity, whether liable to income tax 243

"Any Court of Appeal," meaning of 269

Appeal—From an order under s 24 of the Hindu Marriage Act, 1955—When no valuation given, nor possible to be fixed on the petition under s. 10 of the Act, if lies to the High Court or to the District Judge 932

Arbitration Agreement under an unregistered partnership—*Enforcement of, whether by the Partnership Act—Indian Arbitration Act,* 1940, *s* 29—*Indian Partnership Act,* 1932, *s.* 69(3)

The applicant filed an application in the trial court under s 20 of the Arbitration Act, 1940, praying that the agreement to refer the dispute between the parties for decision by arbitrator be ordered to be filed in the court and the court be pleased to nominate an arbitrator to get the dispute so decided The firm was unregistered The issue was whether this application was barred by s 69 of the Indian Partnership Act

Page

Held, that an application under s 20 of the Indian Arbitration Act for enforcing an arbitration agreement in respect of an unregistered partnership is barred by the provisions of s 69(3) of the Indian Partnership Act, falling, as it does, within the term "other proceedings" included therein

Wahid Hussain, Syed *v.* Maharaj Kumar Mahmud Hasan Khan 1

Banking business—Loss of cash by dacoity, if admissible as a deduction in computing the assessee's income from it under s 10(1) of the Indian Income Tax Act 920

Banaras Hindu University Act, 1915, s 5(2) - read with amending Act of 1958, s 19-A Order no. 6, St. no. 60 Diverse modes and procedure for exercise of the power by the University to terminate services of its employees - Whether and how far cumulative 710

Charge of mala fides, when established 427

Charge-sheet—submitted by a police officer, if amounts to a report in writing within the terms of s 11 of the Essential Commodities Act, 1955 758

Code of Civil Procedure, 1908, ss 47 *and* 60—s. 60(1)(*c*), *application of—The word "Agriculturist" defined and explained Held* (*per* NIGAM, J)—

(i) that the question whether a person is an agriculturist or not is a question of fact to be determined on the circumstances of each case,

(ii) that no inflexible rule or yardstick can be laid down and the question must be decided essentially on the circumstances of each case for we are of the opinion that there may be so many variations in the circumstances of each case that no inflexible rule should be laid down,

(iii) that ordinarily whether a person is an agriculturist or not is not a question turning on the sources of his income but on the nature of his occupation If he engages personally in agriculture in order to earn his livelihood, i e., not as a hobby and devotes most of his time, energy and skill to agriculture then he would normally be entitled to be classed as an agriculturist,

(iv) that he must actively take part in the process of cultivation either by tilling or actively directing and supervising on the spot the process of agriculture A person who merely owns the land and either lets it out to others or engages in agriculture through servants and labourers without taking any active part himself in the day-to-day work of the agriculture, would not be an agriculturist even though the proceeds of this land are main source of his

Page

income and he is unable to maintain his normal standard of life without the income from this land,

(v) that cultivator must be engaged in with the intention of securing a really substantial portion of the means of livelihood. It is not necessary that it should be the main source of his income but the income in a normal year must be such as without it the person concerned would be unable to maintain his standard of living. Thus the engagement in agriculture should be essential for his living in his accustomed manner;

(vi) that the person concerned must, in order to qualify as an agriculturist, devote the major part of his time, labour attention and skill to cultivation of land Otherwise agriculture would not be his occupation and he would not be said to be an agriculturist.

Held (*per* MUKERJI, J) that the question, whether a person was an agriculturist or not, was a question of fact and had to be determined, like other questions of fact, on the evidence and circumstances of each case It may be that in certain cases in order to bring out the real intention of the Legislature, which was to protect a person who was really an agriculturist and not one who took to agriculture as a side business or as a hobby and in whose case agriculture did not engage either his main attention or his entire energies the return that he got from his agricultural activities may have to be taken into account, while in other cases this test may not be of value

Chandrawati Tewari *v* Uttar Pradesh Government . 141

Code of Civil Procedure, 1908, *s* 102—*State Amendment in* 1954 *replacing figure "five hundred" by figure "two thousand"—Parliament amendment in* 1956 *replacing figure "five hundred" by figure "one thousand"—Suit for recovery of Rs* 1,600—*Whether a second appeal competent in the matter*

By s. 102, Code of Civil Procedure no second appeal lies in a suit of the nature cognizable by a Court of Small Causes where the value of the subject-matter of the original suit does not exceed five hundred rupees The State Legislature by an amendment in 1954 substituted rupees two thousand in place of rupees five hundred in the aforementioned section. The Parliament later on by an amendment in 1956 substituted rupees one thousand for rupees five hundred in s 102, Code of Civil Procedure.

Where a suit was instituted in the Court of the Munsif for the recovery of Rs 1,600 which was decreed and an appeal therefrom was dismissed, a question arose as to whether a second appeal or a revision lay to the High Court.

Page

Held, that the State Amendment made to s 102, Civil Procedure Code, by Act XXIV of 1954 was not in any manner affected by the amendment made to that section by Parliament in 1956. So that, so far as the State of Uttar Pradesh was concerned no second appeal would lie in any suit of the nature cognizable by Courts of Small Causes when the amount of value of the subject-matter of the original suit did not exceed Rs.2,000

Consequently a revision was competent in the case and no second appeal lay in the matter

Sri Ram *v.* Gauri Shanker 287

Code of Criminal Procedure, 1898, ss 16, 80 Detention under Preventive Detention Act, 1950 -If it was necessary for the officer who executed the detention order to have notified to the petitioner the substance of the detention order at the time of taking him into custody If a detention order and an arrest warrant are at par . 315

———*ss* 520, 423(1)(*d*), 517, 439(1)(4)(5), s. 520 *scope of* —'*Any Court of appeal*", *meaning of*—*Period of limitation*

Held (i) that s. 520 of the Code of Criminal Procedure empowers every court of appeal, confirmation, reference or revision to which such proceedings ordinarily lie to pass orders. The court can exercise the powers under s 520 and amend, alter or annul the orders passed under s 517 of the Code of Criminal Procedure and pass such orders as may be just.

(ii) further, that it is true that no period of limitation has been provided for such an application The jurisdiction of the Court may be exercised at any time while the property is in the custody of the court The order can be made within a reasonable time

Ram Abhilakh *v.* State .. 269

Commissioner for seizing and producing account books—*Power of Civil Court to appoint—Commissioner so appointed, whether a public servant under the Penal Code—Code of Civil Procedure*, 1908, *ss.* 75 *and* 151, *O. XXVI, O. XXXVIII r.* 5, *O XXXIX, r.* 7(1)(*b*), *O. XL, r.* 1—*Indian Penal Code*, 1860, *ss* 21—*Exp.* 2 *and* 165-*A*.

The Code of Civil Procedure does not—either expressly or under inherent powers—empowers a court to appoint a Commissioner for seizure and production of account books Any appointment so made, is accordingly, without jurisdiction and null and void.

A Commissioner appointed and acting as such cannot, therefore, be deemed to be a public servant for the purposes of a charge for offering bribe to a public servant. Explanation 2 to s. 21 of the Penal Code being confined to the situation or

Page

pre-existing office of a public servant cannot be applied to this case since there was no office or post of a Commissioner as such.

Padam Sen *v.* State of Uttar Pradesh . 352

Commissioner's Order—In revision under U P (Temporary) Control of Rent and Eviction Act, it is of a quasi-judicial nature and it can be quashed under Art 226 of the Constitution of India . . 300

Compensation—Awarding of—under Land Acquisition Act, what points to be considered 988

Competence of State of Legislature—To impose cess on entry of Sugarcane into the premises of a factory 575

Complaint—For prosecution for defaming public officers in discharge of their public functions—Whether to be signed by the officer aggrieved besides the public prosecutor 361

Constitution of India, 1950, Art 19—Molesting a person to prejudice of any act, employment or business—Penal liability for under s 7 of the Criminal Law Amendment Act, 1932, whether in transgression of the liberties guaranteed under the Constitution 33

——Art. 19(1) (*g*)—Cl 11-B of the Iron and Steel Control of Production and Distribution Order, 1941, empowering the steel controller to fix the maximum base prices for the sale of iron and steel, if violates the fundamental right to carry on business 740

——Art. 20(3)—Taking of finger print or specimen handwriting of an accused person, if contravenes the article 851

——Art 21 and 22, if infringed 427

——Art. 22—Scope of 315

——Art 31-B—Effect of 236

——*Arts* 154, 309, 310, 311—*Police Act,* 1861, *s* 7—*and Police Regulations para* 486—*Dismissal of a police officer without compliance to para* 486 *of the Police Regulations—Effect of Doctrine of "Tenure at Pleasure" Explanation and application of the Constitution of India—Interpretation of Statutes—Provisions of a Statute when mandatory*

Where a police officer was dismissed from service in proceedings under s 7 of the Police Act, on a charge of embezzlement during the course of a search conducted by him on the person of one *T*, he filed a writ petition which was allowed on the ground that the provisions of para 486 of the Police Regulations had not been observed On an appeal to the Supreme Court on the ground *inter alia* that rule 486 was only directory and a non-observance thereof did not affect the termination of the service

which was a 'tenure at pleasure' of the President or the Governor under Art. 310 of the Constitution.

Held (i) that every person who is a member of a public service described in Art 310 of the Constitution holds office during the pleasure of the President or the Governor subject to the provisions therein;

(ii) that, power to dismiss a servant outside the scope of Art 154 and therefore cannot be delegated by the Governor to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution,

(iii) that this tenure is subject to the limitations or qualifications mentioned in Art. 311 of the Constitution:

(iv) that Parliament or the Legislatures of the States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Art 310 as qualified by Art. 311 of the Constitution,

(v) that the Parliament or the Legislatures of the States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action without affecting the powers of the President or the Governor under Art 310 of the Constitution, read with Art. 311 thereof,

(vi) that the Parliament and the Legislatures can also make a law laying down and regulating the scope and content of the doctrine of 'reasonable opportunity' embodied in Art 311 of the Constitution, but the said law would be subject to judicial review,

(vii) that if a Statute could be made by Legislatures within the foregoing permissible limits, the rules made by the authority in exercise of the power conferred thereunder would likewise be efficacious within the said limits;

(viii) that the Police Act and the rules made thereunder constitute a self-contained Code providing for the appointment of Police Officers and prescribing the procedure for their removal. Where the appropriate authority takes disciplinary action under the Police Act or the rules made thereunder, it must conform to the provisions of the Statute or the rules which have conferred upon it the power to take the said action If there is any violation of the said provisions, and the said provision is found to be mandatory the public servant would have a right to challenge the decision of that authority,

(ix) when a statute uses the word "shall" *prima facie*, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute For ascertaining the real intention of the Legislature the Court may consider, *inter alia* the nature and the design of

Page

the statute, and the consequence which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not vitiated by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered;

(x) that the object of rule 1 of para 486 of the Police Regulations is not only to enable the Superintendent of Police to gather information but also to protect the interests of subordinate officers against whom departmental trial is sought to be held. From the stand-point of the department as well as the officer against whom departmental enquiry is sought to be vitiated, the preliminary enquiry is very important and it serves a real purpose. Moreover para 487 and para 489 make it abundantly clear that police investigation under the Criminal Procedure Code is a condition precedent for the departmental trial Paragraph 477 emphasizes that no officer appointed under s. 2 of the Police Act shall be punished by executive order otherwise than in the manner provided under Chapter XXXII of the Police Regulations. This is an imperative injunction prohibiting inquiry in non-compliance with the rules When a rule says that a departmental trial can be held only after a police investigation, it is not permissible to hold that it can be held without such investigation.

Provisions of para 486 of the Police Regulations are consequently mandatory

The respondent having been dismissed without a compliance to the provisions of para 486 of the Police Regulations, the dismissal was invalid

The appeal was accordingly dismissed

State of Uttar Pradesh *v* Babu Ram Upadhya 509

———*Art* 226—*Alternative remedy pursued—Petitioner not entitled to relief under Art* 226—*Constitution Art* 19(1)(*f*) (*g*)—*Scope—Guarantee extends to property acquired lawfully and to trade, profession or business which is lawful only —Art* 31 *deals with the field of eminent domain.*

Sea Customs Act, 1878, s. 178-*A Validity of—Enshrines a rule of evidence and does not operate in the field of rights— Provisions of, not hit either by Art.* 19 *or* 31 *of the Constitution of India.*

By s 178-A of the Sea Customs Act where goods are seized under the Act in the reasonable belief that they are smuggled goods the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods are seized

Page

Where gold had been seized from the possession of the petitioner and confiscated on the ground that it was smuggled gold and a penalty was also imposed on the petitioner for the act of smuggling, the petitioner challenged the order by a petition under Art 226 of the Constitution, *inter alia* on the grounds that s 178-A of the Sea Customs Act was void in that it infringed Art 19(1)(f)(g) and Art. 31 of the Constitution.

Held (i) that the petitioner having filed an appeal before the Central Board of Revenue as provided by s. 188 of the Act, he was not entitled to any relief under Art. 226

(ii) that s 178 A of the Act enshrines only a rule of evidence and does not operate in the field of rights and consequently was not hit by either Art. 19 or 31

(iii) that the guarantee under Art 19(1)(f) and (g) of the Constitution extends only to property acquired lawfully and trade, profession or business which is lawful, the protection does not extend to acts which are unlawful and the commission of which amounts to a crime,

(iv) that even if s. 178-A of the Act be taken to be restriction within the meaning of Art 19 it is a reasonable restriction,

(v) that Art 31 of the Constitution operates in the field of eminent domain and deals with the deprivation of private properties while s 178-A of the Act neither purports to be nor has the effect of depriving any person of his property, it enacts only a rule of evidence for the purpose of ascertaining whether gold seized from the possession of a person is smuggled gold or not S 178-A is consequently not hit by Art. 31

The order of confiscation, in view of the finding recorded by the Collector that the gold was smuggled is not open to challenge.

The order imposing the penalty in the absence of a finding that the petitioner had any hand or had anything to do with smuggling, was without jurisdiction and liable to be set aside.

Messrs Parmanand Tekchand *v* Collector of Customs and Central Excise, Allahabad 321

———Art. 226—Seniority of Government Servant, in a particular grade—Fixation of, if justiciable in the High Court under writ jurisdiction. 940

———Art 226—Scope of . 252

———*Art. 226—United Provinces Municipalities Act*, 1916, s 69-*A*(4)—*Enquiry by the President into charges framed against Executive Officer Report submitted to the State Government—Power of the State Government to suspend pending the consideration of the report—Precise nature of the suspension—Suspension from duty and suspension from service considered.*

Page

The argument that it is essentially necessary to enable the State Government to comply with the provisions of s 69-A (1) that it shall have the power to suspend the officer in the sense of suspending him from service fails

Whenever express powers of suspension have been given to the State Government those powers, in the case of officers of the Board, were restricted to suspension pending the disposal of appeals to the State Government and it is reasonable to infer that it was the intention of the Legislature that the State Government should not have a power of suspension in other cases

U P. General Clauses Act, s 16—*Appointing Authority, power to suspend.*

In the case of the Executive Officer the State Government is not the appointing authority—It is impossible to hold that the State Government merely because it possessed the power of disapproval, was appointing authority

L C Agarwal *v* Municipal Board, Hapur 734

———*Art.* 226, *validity of conviction by Panchayati Adalat-Rules under* s 83 *Panchayat Raj Act*

A Panchayati Adalat has the power to appoint a commissioner to make an inspection or to examine specified persons as witnesses but it has no power to appoint a third person to make a general enquiry into the facts alleged in a complaint filed before it Even when a commission is issued the commissioner cannot act on his own without notice to the parties, and the latter must have an opportunity of cross-examining the commissioner on his report

Held, that the procedure adopted by the Panchayati Adalat in the present case was illegal, and it is impossible to find that the appellants may not have been seriously prejudiced

Srimati Buchunia *v* The Sub Divisional Magistrate 674

———Art 226—Writ of *certiorari* or *mandamus*, when to issue 52

———Art 248, VII Sch List I, entries nos 86 and 97 - s 3 of the Wealth Tax Act in so far as it imposes a tax on Hindu Undivided family, if *ultra vires* the Parliament 785

Contract of tenancy without an allotment order of the District Magistrate—About an accommodation which falls within the scope of the U P (Temporary) Control of Rent and Eviction Act and in respect of which an order under s 7 has been made, if valid and enforceable in law 834

Court-fee—*Suit for possession involving cancellation of document—Whether separate and additional court-fee payable on the latter—Court Fees Act,* 1870 (*as amended by and in its application to Uttar Pradesh*), s 7(*iv-A*)

Page

A instituted a suit for possession on the basis of a perpetual lease in her favour by X. The defence was that X had previously executed a deed of *waqf* followed by a gift deed whereby she divested herself of all the interests she had in the property in suit with the result that X had no right to execute the lease in favour of *A*. The question was whether court fees was leviable on both the counts for possession and cancellation of the deed

Held, that court-fee under s. 7(iv A) of the Court Fees Act is payable wherever the relief sought cannot be granted without cancellation of or adjudging void or voidable a decree or instrument securing property having market value, and such court fee is payable over and above the court fee payable for the other relief of possession.

Mohammad Habibur Rahman Khan *v.* Abdul Qadir Faruqi 17

Criminal Misconduct by a public servant—*Categories of—Finding of 'not guilty' on the category charged—Conviction under another category, whether permissible—Presumption of misconduct, when available—Prevention of Corruption Act*, 1947, *s.* 5.

Sub-s. (1) of s. 5 of the Prevention of Corruption Act defines and places criminal misconduct in discharge of duty by a public servant under four categories and sub-s. (3) empowers the Court to make and rely on the presumption of misconduct in cases of unaccountable or disproportionate income. It is, however, only on proof with or without the aid of the presumption of the charges under one or more of those heads that the accused may be convicted under sub-s. (2). Where the charge is limited to one of the aforesaid categories on which there is the verdict of 'not guilty' it is not permissible for the Court to invoke sub-s. (2) or (3) for convicting the accused for any one or more of the remaining categories of misconduct which would amount to setting up or building an entirely new case against the accused

C. S. D. Swamy v. *The State* distinguished on the ground that the charges in that case being under two heads, the finding of 'not guilty' on one did not preclude the Court from invoking the presumption and convicting the accused for the remaining charge

Surajpal Singh *v.* State of Uttar Pradesh . 565

Custom, if can vary general law . 126

Daughter's daughter, if to be excluded from inheritance if there was a custom excluding daughters from inheritance to the estate of her maternal grand-father when at the time the custom grew the daughter's daughter was not an heir under the Hindu Law that is prior to the passing of the Hindu Law of Inheritance (Amendment) Act . . 126

Page

District Board, whether divested of its power of regulation of offensive, dangerous or obnoxious trade, calling or practice after the coming into force of the Panchayat Raj the regulation under the U. P Rice and Dal Mills Control Act or by the regulation under the U P Rice and Dal Mills Control Order, 1948 and the U P Pure Food Act, 1950 373

District Magistrate's Order—Granting or refusing permission under s 3(1) of the U P (Temporary) Control of Rent and Eviction Act, if is an administrative order 300

Essential Commodities Act, 1955. *ss* 7 *and* 11—*Paddy (Restriction on Movement) Order*, 1958, *Requirements for taking cognizance of the offence—Charge-sheet by police officer, if amounts to report by a public servant—Code of Criminal Procedure,* 1898 *ss.* 173 *and* 117

The respondent was tried on a charge under s. 3 of the Paddy (Restriction on Movement) Order, 1958, read with s 7 of the Essential Commodities Act, 1955, for attempting to move three bags of paddy from Rae Bareli District to Sultanpur District without any permit or authority He was convicted by the learned Sub-Divisional Magistrate An appeal was preferred against the order before the Sessions Judge, Rae Bareli

The learned Sessions Judge before whom the appeal came up for hearing acquitted the respondent on the ground that there was no proper complaint before the trial Magistrate as required under section 11 of the Essential Commodities Act, 1955 Against that order of acquittal the State has come up in an appeal The Court while allowing the appeal, *held*–

(i) that section 11 only requires that a court should before taking cognizance of an offence punishable under the Essential Commodities Act, 1955, have before it (*a*) a report in writing, (*b*) the report should contain the facts constituting such offence as should have been made by a person who is a public servant as defined under s 21 of the Indian Penal Code,

(ii) that a charge-sheet submitted by a police officer amounts to a report in writing within the terms of s 11 of the Essential Commodities Act, 1955

(iii) that in the present case, the charge sheet must be read along with general diary report which was submitted along with it and once that is done, there is certainly a sufficient detailed statement of the facts constituting the offence

State *v* Ashanand 733

Essential Supplies (Temporary Powers) Act, 1946, s 11—Report for taking cognizance of offence—Requisites of 740

Page

Execution of a decree For arrears of rent passed before Abolition of Zamindari Sirdari of an expropriatary tenant whether liable to sale 222

Foreigner's Laws (Amendment) Act, 1957 It is prospective in operation and it does not apply to persons who entered India before the coming into force of that Act 215

Foreigner's sojourn in India, *Y, not a foreigner at the time of his entry in India in 1954 but becoming so under the amendment of 1957—Y, whether liable to prosecution Foreigners Act, 1946, ss 2 and 14 Foreigners Order, 1948 Para 7 - Foreigners Laws (Amendment) Act, 1957, s 2*

Section 2 of the Foreigners Laws (Amendment) Act, 1957 is prospective in operation and does not apply to persons who entered India before the coming into force of that Act. A person who was not a foreigner under the law in force at the time of his entry in India could not be subject to paragraph 7 of the Foreigners Order and as such was not liable to prosecution under the Foreigners Act

State *v* Yaqub .. 215

Government Servant—*Seniority of, in a particular grade - No statutory provision regulating seniority—Fixation of seniority by the Government whether justiciable in the High Court under writ jurisdiction—Constitution of India, 1950, Art 226*

Appointment of *A* in post *X* which is later included in post *Y* Seniority of *A* in *Y*, how to be determined.

Held (i) (*per* DAYAL and DESAI, JJ) - In the absence of any statutory provision regulating the seniority of Government servants in a particular grade, the seniority of an officer would depend on or be determined by the discretion or administrative order of the Government That being so, the writ jurisdiction of the High Court cannot be invoked for any relief regarding the fixation of one's seniority in the gradation list

(*Per* UPADHYAYA, J)—In the absence of a specific rule to the contrary, the seniority of a Government servant must be determined by the date of his appointment and confirmation in a particular grade A Government servant aggrieved by any order fixing seniority in the grade can, therefore, invoke and be granted appropriate relief in exercise of the writ jurisdiction of the High Court under Art 226 of the Constitution

(ii) (*per* DAYAL and DESAI, JJ, UPADHYAYA, *J, contra*)—Seniority is a question of comparison which can be made only among incumbents of the same and not those of other post, grade or cadre. Wherefore, if a person is appointed substantially to a post X and is subsequently confirmed therein and thereafter the post X is included in that of *Y*, his seniority in *Y* must be reckoned

Page

on the basis of his inclusion and confirmation in Y and not those of X

State of Uttar Pradesh *v* Sudarshan Deo 940

Habeas Corpus—*Petition under Art 226 of the Constitution of India and s 491 of the Code of Criminal Procedure, 1898 Actual date of order if to be included in computing the period provided—Preventive Detention Act, 1950, ss 3, 7 and 9 if violated—Constitution of India Arts 21 and 22, if infringed—Shifting of grounds if to be allowed at a late stage—Charge of* mala fides, *when established*

The petitioner is one of the oldest workers of the Socialist Party He is also a sitting Member of the Parliament of India He was arrested and detained under the Preventive Detention Act, 1950. He has challenged his arrest and detention by the present *habeas corpus* petition under Art 226 of the Constitution of India and s 491 of the Code of Criminal Procedure, on the grounds, that the order of detention, dated the 29th of April 1960, was bad as it contravened a number of provisions of the Preventive Detention Act particularly ss 3, 5, 7, and 9 of the Act, that there was infringement of Arts 21 and 22 of the Constitution of India and that it was a *mala fide* order having been passed for a collateral object

The court after carefully considering in detail all the grounds raised

Held (i) that the expression "twelve days" in s 3(3) of the Preventive Detention Act should be so interpreted as to include and not to exclude the actual date of the order and that the day for the purpose of computation of this period should be deemed to begin from the preceding midnight and to end on the succeeding midnight at the same time,

(ii) that there has been a breach of the provision of s 3 of the Act in four ways Firstly, the order of approval was not passed by the State Government within the period of twelve days after the making of the order of detention Secondly, the State Government has not passed any order which on the face of it, appears to be an order under s 3(3) of the Act Thirdly the approval being merely a partial one the order of approval cannot be considered to be an approval order as contemplated by s 3(3) of the Act and fourthly the purported order of approval is *ultra vires* of the State in so far as it seeks to modify the objects of the initial order,

(iii) that s 7 of the Preventive Detention Act has also been contravened in at least four ways firstly, because Annexure IV which contains the grounds relied on by the State was served beyond five days, secondly, because it was not served by the authority prescribed by law for the purpose thirdly, because the grounds were not served in such a manner as to provide the

Page

petitioner an adequate opportunity of making an effective representation and fourthly, because the State was inherently incompetent to exercise the power of modification in regard to Annexure II and in any case the State was not competent to exercise the said power at the date at which it purported to do it

(iv) that the failure by the State to send the grounds on which the order was made by the District Magistrate contained in Annexure II to the Advisory Board, itself constitute a clear contravention of the provisions of s. 9 of the Preventive Detention Act,

(v) that the indiscriminate mixing up by the authorities concerned of the two procedures which were designed by the Act to be separate and distinct has, in the present case, resulted in irregularities, which have caused irreparable prejudice to the petitioner, and vitiated the entire proceedings and as such the proceedings are hit by the provisions of Art. 21 of the Constitution;

(vi) that there has been a violation of the constitutional guarantee afforded by the second part of sub-Art. (5) of Art. 22 of the Constitution in not giving the grounds to the petitioner in such a manner as to provide him an adequate opportunity of making an effective representation,

(vii) that it is neither fair nor proper to allow the shifting of grounds to change the stand initially taken on behalf of the State at this late stage as the petitioner would be irreparably prejudiced as he had no opportunity of meeting or contesting this new case,

(viii) that in order to find a charge of *mala fides* established in a case, a court of law would require something more than the bare existence of such defects in the proceedings that are sought to be impugned The court has to proceed merely on inferences drawn from facts, and it is difficult for the court to hold that the charge is established unless it is possible for it to say that the hypothesis of innocence is completely excluded.

(ix) that the detention of the petitioner on the basis of the order, dated the 29th April, 1960, is illegal and cannot be sustained

Prabhu Narain Singh *v.* Superintendent Central Jail, Varanasi 427

High Court's power to review—Orders or decrees passed in special Appeal 399

High Court Rules, 1952, *Ch. VIII, r* 6, *interpretation of*—

In the present case the learned single Judge decided the appeal on 28th September, 1954. On or before that date no application either oral or in writing was made for a certificate of fitness for filing the Special Appeal On 11th November,

Page

1954, however, an application was moved with a prayer that the appeal be certified to be a fit one for filing a special appeal, and the learned single Judge granted the aforesaid certificate on 9th December, 1954. The question now is relating to the interpretation of r. 6, Ch. VIII of the Rules of Court, 1952, as it stood before the Amendment of 1956

Held (i) that in the old rule the word used was 'shall' and not 'may' under the circumstances it cannot be presumed that when the new rule was framed the intention of the rule was to read the word 'may' as 'shall',

(ii) that the word 'may' is indicative of the fact that in case the applicant wishes to make an oral application he could make it only before or at the time of the judgment but there is no prohibition in this rule from making any written application and the leave that has been granted in the present case is a proper leave under the rule as it then existed.

Badri Prasad *v* Jagannath 308

Hindu Marriage Act, 1955, *ss.* 10 *and* 24—*Appeal from an order under s.* 24 *of the Act—When no valuation given, nor possible to be fixed on the petition under s* 10 *of the Act, if lies to the High Court or the District Judge*

A petition under s 10 of the Hindu Marriage Act, 1955, was filed by the appellant, the husband, against the respondent, his wife, in the court of the District Judge, Kanpur who transferred it for disposal to the First Civil Judge, Kanpur No valuation was given on the petition at all. An application for relief under s 24 of the Act was made before the learned Civil Judge by the wife and he passed the order under appeal to the effect that further proceeding on the appellant's petition would remain stayed so long as he did not pay to the wife the sum of Rs.250 for her cost of defending the proceeding as ordered on the 7th April, 1958 The appellant being aggrieved by the order, preferred the appeal to this Court The appeal was valued in the memorandum of appeal at Rs 250 The learned Single Judge referred the case to a larger bench on the question whether the appeal lies to High Court or to the court of the District Judge

The Full Bench, held—

(i) that when no value was fixed on the petition and when there was no law also under which a certain value or a value not below or not exceeding a certain sum ought to have been fixed, it cannot be said that the value of the petition did not exceed Rs.10,000,

(ii) that it would lie to the court of the District Judge only if it could be predicted that the valuation of the petition did not exceed Rs 10,000 In the case of a subject-matter not capable of pecuniary valuation it could not be said that it does not exceed any sum of money

Page

(iii) that the residuary power to entertain an appeal vests in the High Court not only when the value of the suit exceeds Rs.10,000 but also when the subject-matter of the suit is incapable of pecuniary valuation;

(iv) that an appeal from an order passed under s. 21 of the Hindu Marriage Act, 1955, by a Civil Judge who is a district court within the meaning of the Act in a proceeding commenced on a petition under s. 10 of the Act which does not mention any value on the face of it, lies to the High Court.

Paras Ram *v.* Srimati Janki Bai . 932

Hindu Undivided Family—Imposition of Wealth Tax on its net wealth, whether *ultra vires* the Parliament . . 785

Identifying witnesses—Effect of their non production in the Court of the Committing Magistrate 293

Income-tax—*Portion of company's receipts on account of and earmarked for charity, whether liable to income-tax—Indian Income Tax Act*, 1922 s 4(3)(*i*).

The assessee company which acted as a clearing house for the sale of gold and silver recovered Re 1-4-0 per 'parcha' on purchase and sale out of which one anna was to be credited to charity Of the money so collected for charity one-fourth was to be spent on miscellaneous items and the balance of three fourth was to be kept in reserve and spent for charity according to resolution and discretion of the Board. It was conceded by the department that a substantial portion of this fund was spent on the eye-hospital maintained by the company

Held, that the amount so collected on account of charity could not, under the rules, be spent otherwise and did not, therefore, form part of the company's income The initial character of the receipt itself being charitable, there was no question of any exemption under s. 4(3)(i) of Income Tax Act. The receipts for charity were under the circumstances, not liable to income tax

The Agra Bullion Exchange Ltd. *v.* Commissioner, Income-tax 243

Indian Income Tax Act, 1922, s 10(1)—*Loss of cash by dacoity, if admissible as a deduction in computing the assessee's income from banking business.*

The assessee is the Naini Tal Bank Limited which carries on the business of banking. The assessee company had various branches and one such branch was situated at Ramnagar At that branch on 11th June, 1951 at 7 p m., dacoits opened the safes and took away cash amounting to Rs 1,06,000 and various ornaments, etc which had been pledged with the Bank-

Page

The assessee claimed as a deduction in computing its income from the banking business for the assessment year 1952-53 the sum of Rs.1,06,000 which had been taken away by dacoits from the Ramnagar Branch

The Income-tax Officer refused to allow this amount as a deduction on the ground that the loss was not incidental to the business of the bank The order was confirmed on appeal

On reference to the High Court, it was *held* (i) that it cannot be said that there is no incidental risk of theft or robbery to circulating capital of bank

(ii) that the loss of cash by dacoity is admissible as a deduction under s 10(1) of the Indian Income Tax Act in computing the assessee's income from banking business.

Messrs Naini Tal Bank Ltd *v* The Commissioner of Income-tax .. . 920

Indian Partnership Act, 1932, s. 69(3)—Arbitration agreement under an unregistered partnership, Enforcement of 1

Indian Penal Code, 1860, s 302—*Double murder—Plea of private defence or self-defence if and when acceptable-Independent witness—Testimony when acceptable*

The appellant was convicted by the Sessions Judge, Aligarh, under s 302, Indian Penal Code and was sentenced to death for the murder of two persons Sonpal and Rajpal The appellant admitted having struck Sonpal and Rajpal with a spear but pleaded the right of private defence The appeal came up for hearing before the Bench of OAK and DHAVAN, JJ, but there was difference of opinion on the ground of appellant's right of private defence and so the case was referred to VERMA, J for opinion who agreed with the view taken by DHAVAN, J

Held (*per* OAK, J)—

That the three accused were aggressors and since Chhiddi appellant and his two supporters were the aggressors, the appellant cannot claim the right of private defence The plea of private defence raised by Chhiddi accused fails

Held, (*per* DHAVAN, J)—

(i) that the prosecution story of the quarrel appears improbable The story of the second encounter is out of place and has been interpolated to make Chhiddi and his brother the aggressors;

(ii) that the court, cannot permit itself to be paralysed by the label, 'independent' witness and submit to evidence which a prudent man will never act upon;

Page

(iii) that witnesses may be 'independent' but one can be biased for righteous motives. The independent witnesses were probably convinced that there was nothing wrong in modifying their account to ensure that the killer was punished specially when two men had been killed in upholding the honour and dignity of their mother;

(iv) that if the prosecution case is accepted one is compelled to defend the veracity of the prosecution witnesses on almost every controversial point by advancing an unusual explanation.

(v) that on the evidence it is likely that Chhiddi acted in self defence.

Held (*per* VERMA, J.)

(i) that the prosecution evidence in the main is false.

(ii) that the appellant is forty years of age and he found himself against two young men, one armed with a Sankhi and the other with a *lathi* and he received two injuries, and if in these circumstances he apprehended death or grievous hurt his apprehension cannot be said to be unreasonable and if in those circumstances he caused one injury to each of the two deceased persons, he cannot be blamed for it;

(iii) that to put it at its lowest, the question whether the appellant did or did not have the right of private defence is not free from doubt and upon the evidence, the greater probability is that he had such a right.

Chhiddi *v.* State 609

———*s.* AFL—*Value of identifying witnesses and effect of their non-production.*

Held (i) that the evidence of identification has always been treated by courts to be a weak kind of evidence. Technically, the prosecution is now entitled to refrain from examining witnesses in the court of the Committing Magistrate but we are clear in our mind that where such action proceeds from oblique motives, it has not to be only discouraged but must of necessity affect the value that can be attached by the courts to the evidence of such identifying witnesses;

(ii) that each case has to be considered on its particular facts and no rule of thumb can be laid down. There may be cases in which the prosecution is unable to examine certain identifying witnesses in the committing magistrate's court for genuine reasons. This may be due to circumstances beyond their control or even with the idea of expediting committal proceedings;

(iii) that it is true that a Magistrate may summon such witnesses as he considers necessary in the interest of justice but that has nothing to do with the conduct of the prosecution;

Page

(iv) that the value to be attached to the evidence of every particular witness has to be judged in the particular case by the court concerned and, as stated earlier, no rule of thumb can be laid down to guide the subordinate courts in every case;

(v) that in the particular circumstances of the case the learned Assistant Sessions Judge did not err when he refused the evidence of the prosecution witnesses who were not examined in the court of the Committing Magistrate.

State *v.* Ram Dayal . 293

Industrial Dispute—*Order by the State Government to pay bonus to workers for previous year, whether retrospective in effect—Power vested in the State Government, whether violative of the constitutional guarantee of 'equality before law' or 'freedom of business'—Reference of dispute for conciliation whether obligatory on the part of the State Government after an executive action in that behalf—U. P. Industrial Disputes Act,* 1947, *s.* 3, *cls* (*b*) *and* (*d*)—*Constitution of India,* 1950, *Arts* 14, 19, *cls* (1)(*g*) *and* (6).

The State Government in exercise of its power under cl. (*b*) of s 3 of the U P. Industrial Disputes Act, issued a notification on July 5, 1950 directing various sugar factories to pay bonus to their workmen at certain rates for the years 1947-48 and 1948-49 In a petition by the respondent for prohibiting the State Government from enforcing the notification

Held (i) that cl (*b*) of s 3, of the Act in question cannot, it is true, be given a retrospective effect The impugned order cannot, however, be challenged on that score since it does not seek or amount to a retrospective application of the same. All that the order purports to do is to require the employers to pay specified amounts in future though the said amounts are fixed by reference to profits made in the preceding years. It is open to the State Government to make payment of bonus to workmen a condition of their employment in future and thus augment their past wages,

(ii) that the provisions of clause (*b*) are not in any sense alternative to those of cl (*d*) of s 3, since the former can be availed of by the State Government only in an emergency and as a temporary measure. The Government, therefore, does not have absolute or unfettered discretion to proceed under either of the two clauses There can thus be no question of or scope for discrimination in exercise of powers by the Government under these clauses;

(iii) that the action of the State Government being in an emergency and in the public interest would well fall within the permissible restraint on the freedom of business under clause (*b*) of Art. 19 of the Constitution;

Page

(iv) that, where the State Government passes an executive order under clause (*b*), it would, when so required, be bound to refer the dispute in question for conciliation or adjudication under clause (*d*) of s 3 of that Act

State of Uttar Pradesh *v* The Basti Sugar Mills Co 381

Independent witness--Testimony when acceptable 609

Interpretation of Statutes—Presumption in favour of the Constitutionality of a statute--Rule of harmonious construction 33

Interpretation of Statutes—Rules on 573

Iron and Steel Control of Production and Distribution Order, 1941, cl 11-B—Empowering the steel controller to fix the maximum base—prices for the sale of iron and steel, if violates the fundamental right to carry on business guaranteed by Art. 19(1) (*g*) of the Constitution of India 710

Land Acquisition Act, 1894, s 18—*Reference under - Points to be considered in awarding compensation Potential building site, situation, location, etc—Proportion of shares between landlord and tenants*

A direct consequence of the finding that the land is a potential building site is that while judging its market value the rent alone earned from it through agricultural tenants will not be a correct measure Its potentiality as a building site is a material circumstance which adds to its value independently and distinctly from the rights held by tenants. It is with reference to this potentiality that the value has therefore to be determined And to this end the correct mode would be to judge the value with the aid of exemplars by which similar lands in the locality might have been transferred for such a purpose

Under the present Tenancy Act which was applicable to the land in suit on the date of the notification under section 4, the tenant's rights were decidedly larger than under the Tenancy Act of 1926.

These rights have while enlarging the value of tenant's interest in the land in suit has further cut down or diminished the value of the proprietor's interest

Held, that in the changed circumstances and in the absence of any material to show differently the ratio of eight annas and eight annas will be fair.

Azimuddin Ashraf, Chaudhari *v* Municipal Board, Bara Banki 988

Landlord and Tenant—*Permission for eviction by the District Magistrate—Revocation of, whether competent and affects the suit filed before revocation—U P (Temporary) Control of Rent and Eviction Act,* 1947, s 3

Page

Notice terminating the tenancy and to quit the premises—Signed by a lawyer and purporting to be on behalf of the land lord—Whether effective—Transfer of Property Act, 1882, s 106

(1) Permission by the District Magistrate for evicting the tenant under sec 3 of the Control of Rent and Eviction Act is an administrative order and is accordingly revocable notwithstanding the absence of a specific provision in that behalf. Such revocation will not, however, defeat or bar the prosecution of the suit filed before revocation

Obiter (*per* DESAI, J, LAL, J. *contra*)— The position regarding the continuance of the suit would be the same if the permission is subsequently reversed by the Commissioner or the State Government

(2) Section 102 of the Transfer of Property Act authorizes the notice terminating the tenancy to be signed by or on behalf of the landlord. A notice, therefore, purporting to be on behalf of the landlord but signed by the lawyer alone would be good provided such authority is established by proof or, as was in this case, by admission in the pleadings or otherwise

Per LAL, J (DESAI, J. *contra*)—When a lawyer gives a notice stating to be an instruction from his client, there is a presumption in favour of such instruction

Dwarka Nath Munshi, *v* Gayatri Devi 678

Liability of Employees or Agents—For sale of adulterated food - *Mens rea,* how far relevant ... 603

Limitation Act, 1908, s 22—*If applicable to one who is already a party to the suit—Custom, if can vary general law—Daughter's daughter if to be excluded from inheritance—Hindu Law of Inheritance (Amendment) Act,* 1929

The appeal has arisen out of a suit instituted for damages and recovery of possession of cultivatory plots and the grove. The main points raised are firstly that Srimati Parwati Kunwar defendant applied for filing the suit as a plaintiff on 28th August, 1950, after the limitation for filing the suit was over as such her claim to recover possession of the property is barred by time, and secondly whether a custom excluding daughters would also exclude daughter's daughter from inheritance when at the time the custom grew the daughter's daughter was not an heir under the Hindu Law

The court after considering in detail,

Held (1) that a mere reading of s 22 of the Limitation Act indicates that the provisions of cl (1) of this section are not intended to apply to the case of a person who is already a party to this suit and who is allowed to be transposed from a defendant to a plaintiff or *vice versa,*

Page

(ii) that a custom has the effect of making a variation in the general law prevailing at the time when such custom comes to be recognised In order, therefore, to deprive a party of its rights which it has under the general law, the custom must either expressly exclude him from that right or that the intention to exclude must necessarily follow by implication from the words of the proved custom;

(iii) that a custom excluding daughters from inheritance would not exclude the daughter's daughter from inheriting to the estate of her maternal grand-father when at the time the custom grew the daughter's daughter was not an heir under the Hindu Law, that is prior to the passing of the Hindu Law of Inheritance (Amendment) Act

Vikrama Singh *v.* Smt. Parbati Kunwar ... 126

Local Area, meaning of 573

Loss of cash by dacoity—If admissible as a deduction in computing the assessee's income from banking business under s. 10(1) of the Indian Income Tax Act . 920

Land *emerging from the bed of the river by diluvion whether comes within the definition of 'land' and vests in the Gaon —Removal of encroachment on land vested in Gaon Samaj—Cognizance of, without a resolution of the Gaon Samaj, whether valid—Sub-Divisional Officer, to order for Compensation, whether competent, U P. Zamindari Abolition and Land Reforms Act*, 1951, *s* 117—*U. P Zamindari Abolition and Land Reforms Rules*, 1952, *r.* 115, *sub rr. C D. F and G.*

Land emerging from the bed of a river by its diluvion action falls within the definition of 'land' and accordingly vests in the Gaon Samaj under s. 117 of the U. P Zamindari Abolition and Land Reforms Act.

Proceedings under r 115-C of the U. P. Zamindari Abolition and Land Reforms Rules may be initiated even otherwise than on the resolution of the Land Management Committee and cannot, therefore, be assailed simply on the averment that there was no such resolution. Moreover, the proceedings in this case having been started on a report of the Lekhpal who happens to be the Secretary of the Gaon Samaj who as such was competent to commence the proceedings under r 115-G (ii)

The Sub-Divisional Officer is competent to award compensation in a proceeding for removal of the encroachments.

Mubarak Ali Khan *v* Land Management Committee, Akoharia 26

Molesting a person *to prejudice of any act, employment or business—Penal liability for whether in transgression of the liberties guaranteed under the Constitution—Criminal Law*

Page

Amendment Act, 1932, s 7—*Constitution of India*, 1950, *Art* 19

Interpretation of Statutes—Presumption in favour of Constitutionality of statutes—Rule of harmonious construction

The liberties guaranteed under Art. 19 of the Constitution are subject to the impositions of reasonable restrictions on the enjoyment of the same. Plain and simple loitering is not an offence. It is only such loitering which involves or imposes coercion that is punishable under s. 7 of the Criminal Law Amendment Act, 1932. The scope of the provisions of s. 7 being so determined it does not offend against the liberties guaranteed under Art 19 of the Constitution and is, therefore, valid as a whole. Proceedings, however, on the assumption that the provisions of the impugned section cannot, in its entirety be so circumscribed, the first part of sub-s. (1) (*a*) is distinctly confined to acts or tendencies aforesaid and being severable from the rest is valid and operative as such and to that extent

There is a presumption in favour of the constitutionality of a statute and this presumption would, in such circumstances, fail only where a harmonious interpretation of the diverse provisions involved in the working of the law is not possible.

Raj Narain *v* State 33

Motor Vehicles Act, 1939, ss 2(21), 14, 47, 48, 61 and rule 72(*a*) —Considerations of 201

Nationalization of a transport service—*Cancellation of an existing permit on the notified route—Permit to the displaced operator on another route for which X, among others, had a permit—Validity of the permit to the displaced operator—X, whether aggrieved and entitled to constitutional remedy—Motor Vehicles Act*, 1939, *Chs IV, IV-A, ss.* 43, 47, 48, 68(*c*) (*F*) (*G*)—*U P. State Road Transport Service (Development) Rules*, 1958, *rr* 4(1) *and* 10—*Constitution of India*, 1950, *Art* 226.

A, *B* and *C* whose permits for running a stage carriage on a certain route were, on account of the service being undertaken by the State Government, cancelled were, in the alternative or by way of compensatory relief, given permits on another route for which X among others, had a permit. In a petition by X for writ of *certiorari* for quashing the resolution of the Regional Transport Authority (R T A.) which issued the permit in question and for a *mandamus* commanding the R. T A to forbear from permitting *A*, *B* and *C* to operate on the alternative route

Held (1) that the resolution in question being an administrative order, though liable to be quashed otherwise, was not amenable to *certiorari* Moreover .the resolution was a complet-

Pages

ed transaction and the mere quashing of the same will not in any way enure for the benefit of the petitioner;

(ii) that it is well settled that *mandamus* issues only where there is a legal right and no specific or adequate alternative relief for enforcing that right. As ruled by the Full Bench in the *Indian Sugar Mills Association* v. *The Secretary to Government, Uttar Pradesh* this Court should exercise its powers under Art 226 of the Constitution in those clear cases where, *inter alia,* the rights of a person have been seriously infringed The presumptive loss of earning by the mere increase in the number of bus operators on the same route is not such an injury;

(*Per* DHAVAN, J)—The jurisdiction of the High Courts under Art. 226 of the Constitution is neither identical nor co extensive with that of English courts.

The petitioner cannot under these circumstances, be said to be the aggrieved person for the purposes of the constitutional remedy on merits, held (*obiter*)

(iii) that notwithstanding the absence of such a provision in the scheme of nationalisation as settled and published under the Motor Vehicles Act, the Regional Transport Authority has, under s 68 G(2) the power to issue a permit in lieu of compensation to a displaced operator whose existing permit has been cancelled under s 68 F;

(iv) that in issuing the alternative permit the Transport Authorities need not follow the elaborate procedure prescribed under Chapter IV of the Act. The requisite procedure is contained in s 68-G(2) The difference in procedure cannot be attacked as being discriminatory for the two are meant for two different categories of operators—those praying for fresh permits and those deprived of their permits, the initiative and prayer in the former being on behalf of the applicants while the initiative and offer in the latter being on behalf of the Transport Authority and are reasonably related to their circumstances;

(v) that the notification, under s 68-F(2) cancelling an existing permit even where it is issued by the Regional Transport Officer cannot be challenged in a writ petition firstly because it is a ministerial act and secondly because the power in question could and has been validly delegated under s. 44(5) read with r. 10 of the U P. State Road Transport Service (Development) Rules, 1955

Regional Transport Authority Gorakhpur *v* Kashi Prasad Gupta 52

New Points—raised in appeal before the Supreme Court—whether and when permissible 740

Page

Officers and Servants of the Municipal Board—*Regulation for affording reasonable opportunity of showing cause against dismissal, removal or reduction, etc., whether* ultra vires *Government whether estopped from pleading its vires*— *U P Municipalities Act,* 1916, s 297—*United Provinces Municipalities (Amendment) Act,* 1953, s 38(2)—*Regulation under notification no.* 6471/*XI*—226-46, *dated* 29*th November,* 1946

The power to make regulations under and on matters enumerated in s 297 of the Municipalities Act, as it stood before 1953, did not cover "conditions of service" and therefore the regulation made in 1946 insisting *inter alia* on reasonable opportunity to the employee of showing cause against the proposed dismissal, removal or reduction is *ultra vires*. There is no other provision in the Municipalties Act under which this regulation could be framed or saved and the addition of the expression "conditions of service" in s. 297(1) (*k*) by Act VII of 1953 while revealing the legislative consciousness of the absence of and the intent to supply this power could not animate the regulation which was void and lifeless when framed

The removal from office of an Executive Officer by an order some time in 1954 without compliance with the safeguards under the impugned regulation was, therefore, good and unassailable

Quaere whether the Government was estopped from pleading its *vires* in defiance of the regulation

U P State *v* Murtaza Ali 767

Order by the State Government to pay bonus—to workers for previous year, whether retrospective in effect- Power vested whether violative of the constitutional guarantee of 'equality before law' or 'freedom of business' 381

Paddy (Restriction on Movement) Order, 1958, s 3—read with s 7 of the Essential Commodities Act, 1955—Requirements for taking cognizance of the offence 758

Panchayati Adalat—Acting under the Panchayat, Raj Act, 1947 if has power to appoint a third person to make a general enquiry into the facts alleged in a complaint filed before it 671

Payment of Wages Act, 1936, ss. 7(2)(*h*) and 15—Penalty imposed, on by the authorities under the Railway Establishment Code—Whether subject to the jurisdiction of or liable to be superseded by the authority acting under the Act ... 169

Police Act, 1861, s 7—Dismissal of a police officer without compliance to para 486 of the Police Regulations—Effect of Doctrine of "Tenure at pleasure" 509

Page

Power of Civil Court—to appoint Commissioner for seizing and producing account books . . 372

Power to fix maximum base prices for sale of iron and steel *Constitutionality of—Validity of the notification fixing the price—Report for taking cognizance of offence—Requisites of, Iron and Steel, Control of Production and Distribution Order,* 1941, *cl. 11-B—Notification by Controller dated 1st July,* 1952—*Essential Supplies (Temporary Powers) Act,* 1946 s. 11—*Constitution of India,* 1950, *Art.* 19(1) *(g)—Supreme Court Appeals—Practice in, New points—Whether and when permissible.*

Clause 11-B of the Iron and Steel Control of Production and Distribution Order, 1941, empowering the Steel Controller to fix the maximum base-prices for the sale of iron and steel does not violate the fundamental right to carry on business guaranteed by Art 19(1) (g) of the Constitution and is, therefore, valid

The notification of the Controller dated 1st July, 1952, fixing, in exercise of the aforesaid power, the prices together with the conditions appended thereto are valid and enforceable There is no substance in the contention that it is *ultra vires,* discriminative or indefinite

The report under s 11 of the Essential Supplies (Temporary powers) Act, 1941, on which cognizance of the offence may be taken by the court is required to contain only "a statement of facts constituting the offence" The section does not require the report to be or contain either the charge-sheet or the evidence to support the charge. Contents of the report are to ensure that there shall be a record that the public servant is satisfied that a contravention of the law has taken place. If the contravention in question is sufficiently designated in the report, the requirements of the section are satisfied

Save in exceptional circumstances, e g, subsequent legislation or questions of fundamental and general importance new points cannot be urged in appeal before the Supreme Court.

Bhagwati Saran *v.* State of Uttar Pradesh . . 740

Prevention of Corruption Act, 1947, s 5—Presumption of misconduct, when available . . 565

———*ss* 5(1)(*d*) *and* 5(2)—*Question of validity or sufficiency of the sanction, when to be raised—Sanction to be validly and properly given—Otherwise trial vitiated.*

Held (1) that the correct view is that the question of the validity or sufficiency of the sanction may be raised by the accused at any stage before the final decision has been given by the trial court;

Page

(ii) that the sanction has been granted as a matter of routine, perhaps on the request of the prosecuting authority and without the application of his mind by the officer concerned,

(iii) that as the sanction has not been validly and properly given, the whole trial is vitiated.

Budh Sagar *v.* State . . 416

Preventive Detention Act, 1950, *s.* 3(*A*)(*ii*), *detention under—Ss.* 46, 80 *of the Code of Criminal Procedure—Constitution of India, Art* 22, *scope of.*

The question raised in the case is about the constitutionality of the petitioner's detention for the reasons, as alleged, that at the time when he was taken into custody the police officer, though asked, had failed to show him the detention order or to communicate to him the grounds of his arrest.

Held (i) that the constitutional protection assured to a person by cl (i) of Art. 22 of the Constitution of India is not made available to a person who is arrested or detained under a law providing for the preventive detention;

(ii) that a detention order is not an arrest warrant as defined in the Code of Criminal Procedure and s. 3A of the Preventive Detention Act has not laid down that a detention order shall be treated at par with an arrest warrant except in the matter of executing it;

(iii) that the obligation laid under s 80 of the Code of Criminal Procedure on the person arresting cannot under the circumstances be extended to the case of a detention order which is entirely different from a warrant of arrest

S. N. Tangri *v* State 315

———ss 3, 7 and 9—if violated 427

Prosecution for defaming public officers *in discharge of their public functions—Special procedure for—Pre-requisite of sanction how to be shown or established—Complaint for, public prosecutor—Code of Criminal Procedure,* 1898, *ss.* 198 *and* 198-*B.*

The sanction of the prescribed authority, wherever made a condition precedent for any prosecution, must appear or where not so apparent, be established by extraneous evidence to have been given after applying his mind to the facts and materials before him. Mere production of a document which sets out the names of persons to be prosecuted and the provisions of the statute alleged to have been contravened and purporting to bear the signature of the prescribed authority does not invest the Court with jurisdiction to try the offence

Page

Section 198-B of the Code of Criminal Procedure, in terms, contemplates a complaint in writing by the Public Prosecutor and of no one else and it would be an unwarranted addition to the words 'as also of the officer aggrieved, to sub-s. (1) if it were to be held that the complaint must necessarily be signed by the aggrieved officer as well.

The special procedure laid down in s. 198-B is intended not to be supplementary but as an alternative to that in s. 198 of the Code.

P. C. Joshi *v.* State of Uttar Pradesh 361

Prosecution under the Foreigners Act—If, a person who was not a foreigner under the law in force at the time of his entry in India could be subject to para 7 of the Foreigners Order, 1948 and liable to prosecution under the Foreigners Act ...

Railway employees—*Penalty imposed, on by the authorities under the Railway Establishment Code—Whether subject to the jurisdiction of or liable to be superseded by the authority acting under the Payment of Wages Act—Indian Railway Establishment Code—Government of India Act,* (26 *Geo.* 5 *Ch.* 2), 1935, *s* 241(4)—*Payment of Wages Act,* 1936, *ss* 7(2)(*h*) *and* 15

The rules regulating the conditions of Civil services under the Union or a State are of course subservient to the provisions of any Act passed by the appropriate legislature but the Payment of Wages Act *qua* the Rules framed and incorporated in the Railway Establishment Code is not such an Act since it purports not to regulate the conditions of service but simply ensure due payment of the wages. The authority acting under the Act has, accordingly, no jurisdiction to take cognizance of or set at naught the penalty imposed by the authorities acting under the Code.

Moreover, the penalty of recovering the loss occasioned to the Government by the negligence of a Railway employee by monthly deductions from his pay imposed and maintained by the competent authorities under the Code falls under s. 7(2)(*b*) of the Act and is, therefore, a permissible deduction under the Act, itself. There is nothing in the Act to suggest that the expression "other authority competent" preceded, as it is, by 'Court' must be read *ejusdem generis* with the same and even if it be so the railway authorities, in view of the provisions regarding notice, opportunity and hearing, etc. were required to act and had in fact, acted in a quasi-judicial capacity and manner.

Quaere whether the authority appointed by the State Government under s. 15 of the Payment of Wages Act would be competent to deal with employees of the Central Government.

Kundan Lal *v.* Union of India 169

Page

Reference of Industrial Dispute for conciliation—Whether obligatory on the part of the State Government after an executive action in that behalf 384

Regional Transport Authority *and the Appellate Tribunal—Identity of and respective powers regarding: (a) grant of permit, (b) fixation and alteration of maximum number of operators on a specified route—Fight of a permit-holder; whether affected by: (x) issue of a permit not authorised by law but within the maximum limit fixed, (y) increase in the number of services on that route—Motor Vehicles Act,* 1939. *ss.* 2(21), 44, 48 *and* 64—*Motor Vehicle Rules* 72(*a*).

Notwithstanding the fact that some members are common to both, the Regional Transport Authority is quite distinct and separate from the State Transport Authority Tribunal (Appellate Tribunal) and the latter has no power of supervision over the former.

It is not competent for the authorities under the Motor Vehicles Act to grant permit for a route different from the one applied for by the petitioner.

The limit regarding the maximum number of stage carriages for service on a specified route once fixed remains binding and unalterable till it is revised on the grounds and in the manner prescribed by law

The power to fix the maximum number of stage carriages for a specified route vests in the Regional Transport Authority and the order passed in exercise of the same being unappealable, it is not within the competence of the Appellate Tribunal, while seized and disposing of an appeal by a person to whom permit had been refused, to refix the number aforesaid The Appellate Tribunal does not likewise have the power to fix the number of services each day.

Mohammad Luqman Sharif *v* State Transport Authority Tribunal . .. 201

Regulation of offensive, dangerous or obnoxious trade, calling or practice—*District Board, whether divested of its power in this behalf after the coming into force of the Panchayat Raj Act or by the regulation under the U. P. Rice and Dal Mills Control Order,* 1948 *and the U. P. Pure Food Act,* 1950—*United Provinces District Boards Act,* 1922, *ss.* 91, 106 *and* 174 (2)(*k*)—*United Provinces Panchayat Raj Act,* 1947, *ss.* 15, 16, 37(*d*) *and* 111.

The duties and functions vested in the village authorities under the Panchayat Raj Act do not include the regulation of offensive, dangerous or obnoxious trade, calling or practice and there is therefore, no question of the District Board being divested of that duty and power expressly conferred on

Pages

it. In view of the scheme of the Act and the duties enumerated therein, it is not possible to give the expression 'sanitation' in s 15(*c*) and 'for the purpose of promoting or maintaining health, safety and convenience of persons, residing within the jurisdiction of a Gaon Panchayat' in s 111 of the Panchayat Raj Act its widest amplitude so as to cover the power in question.

Notwithstanding the fact that there may be some overlapping of the regulatory provisions under the U. P. Rice and Dal Mills Control Order, U. P. Pure Food Act and the District Boards Act, the validity of the by-laws framed and the fee charged thereunder by the District Board remains unimpaired, since the purpose of each is different from the other.

The District Board, Ghazipur *v* Lakshmi Narain Sharma 373

Sale of adulterated food—*Liability of employee for*—Mens rea, *how far relevant*—*Prevention of Food Adulteration Act*, 1954, *ss* 2(*xiii*), 7 *and* 16

Every one who by or for himself or through or on behalf of another sells adulterated food is liable to punishment There is no warrant in law for immunity to employee or agents. The fact that they (employees or agents) are ignorant of and have nothing to gain by the adulteration is irrelevant for the purposes of liability although the Court may on that account take a lenient view of the offence and award a lesser sentence

Sarjoo Prasad *v* State of Uttar Pradesh 603

Sanction—for prosecution under Prevention of Corruption Act, 1947—Question of validity or sufficiency of it, when to be raised—If not validly and properly given, its effect . 416

Sea Customs Act, 1878, s. 178A—Validity of—Enshrines a rule of evidence and does not operate in the field of rights—Provisions of, not hit either by Art. 19 or 31 of the Constitution of India 321

Self-defence—Plea of, if and when acceptable .. 609

Seniority of Government Servant—In a particular grade—Fixation of, whether justiciable in the High Court under writ jurisdiction . 940

Shifting of grounds—by the State in a Habeas corpus petition, if to be allowed at a late stage . .. 427

Sirdari of an ex-proprietary tenant—*Whether liable to sale in execution of a decree for arrears of rent passed before abolition of zamindari*—*United Provinces Tenancy Act*, 1939 *ss* 168 *and* 251—*Uttar Pradesh Zamindari Abolition and Land Reforms Act*, 1951, *ss*. 7, 153, 166 *and* 200—*U. P Land Tenure* (*Legal Proceedings*) (*Removal of Difficulties*) *Order*, 1952, *paras* 2 *and* 3.

Page

In February, 1951, *S* applied for the execution of decree for arrears of rent by sale of the ex-proprietary holding of *M*. After the coming into force of the Zamindari Abolition and Land Reforms Act, *M* objected to the executability of the decree as such on the ground that the land in question became *sirdari* which was not transferable and, therefore, not liable to sale

Section 7(*b*) of the Zamindari Abolition and Land Reforms Act read with paragraphs 2 and 3 of the Removal of Difficulties Order, 1952 leaves intact the right to recovery of rent under the U. P Tenancy Act subject to the only prohibition against execution of decree under s 168 by ejectment of the judgment-debtor which is different from execution of decree by sale of the holding under s. 251 of the Tenancy Act. The provisions of s 251 have, however, become unenforceable for the simple reason that the right that was saleable no longer exists and what is acquired in lieu thereof has been made unsaleable

Malik Nizamuddin *v* Sheo Prakash 223

Special Appeal—Certificate of fitness for filing it—Interpretation of r. 6, Ch VII of the Rules of Court, 1952, as it stood before the Amendment of 1956 308

Special (Letters Patent) Appeal—*Power of High Court to review orders or decree passed in—Code of Civil Procedure*, 1908, *ss* 114, 117, 0 47—*Letters Patent (High Court of Judicature, Allahabad)*, 1866, *cl.* 10—*United Provinces High Courts (Amalgamation) Order*, 1948, *cl.* 7.

There is nothing in the Code of Civil Procedure to exclude the application of the provisions of s 114 and of the rules under Order XLVII to orders or decrees passed by the High Court in Special Appeals under cl 10 of the Letters Patent read with cl. 7 of the U P High Courts (Amalgamation) Order and accordingly the High Court does have the power to review the same

Jwala Prasad *v* Jwala Bank Ltd 399

Staff of Banaras Hindu University—*Power of the University to terminate services of its employees—Diverse modes and procedure for exercise of the power—Whether and how far cumulative—Banaras Hindu University Act*, 1915—*Banaras Hindu University (Amendment) Act*, 1958, *s.* 19-*A*, *Ord. no.* 6, *St. no.* 39.

An analysis of the relevant provisions of the Banaras Hindu University Act, the Statutes and the Ordinances leads to the conclusion that the University derives its power to dispense with the services by the requisite notice or salary in lieu thereof, (ii) Ordinance no 6 termination for (*a*) misconduct, (*b*) physi-

Page

cal infirmity, (*c*) inefficiency, (*d*) breach of the terms of the agreement of service, after calling for and considering in each case the explanation from the employee in question or (*e*) after four months' notice or salary, (iii) Statute no. 30, termination on the ground that the continuance of the employee in service would be detrimental to the interests of the University, proceeding with a resolution of the Executive Committee to that effect, forwarded to the Solicitor General, reference by the latter, if a *prima facie* case is made out, to the Reviewing Committee and recommendation of the last and final action by the Executive Council.

Where the law allows alternative remedies, any one or more of those can be invoked unless one remedy is expressly or by necessary implication excluded by the other. Applying this test to the aforesaid modes or procedures, it is clear that the simple power of terminating service after notice or salary in lieu thereof is not available to the University when the provisions of Statute 30 had once been invoked and pursued and the allegation of derogatory conduct had already been forwarded to and scrutinized by the Solicitor-General and the Reviewing Committee and the matter was pending before the Executive Council (if a case has not at all sent to the Solicitor-General and the Reviewing Committee other considerations might have arisen) on the ground (*x*) that the Ordinances are subject and must, in case of clash, yield to the Statutes, (*y*) Statute no. 30 was enacted by the Parliament for special action in special circumstances and when once invoked in or applies to a particular case it would by necessary implication, exclude exercise of power under the agreement or the Ordinance, (*z*) dropping of action under the Statute would deprive the employee of his right to show cause before the Executive Council against the finding of the Reviewing Committee.

The ultimate power of the Executive Council under cl. (5) of Statute 30 to take such action on the recommendation of the Reviewing Committee as it may think fit contemplates and must be confined to some action completing the intent and purpose of the enquiry itself. It does not include the power to drop the enquiry and take recourse to proceedings besides the Statute.

Akshaibar Lal *v* Vice-Chancellor Banaras Hindu University .. 710

State amendment—Made to s. 102 of Code of Civil Procedure if in any manner affected by the amendment made to that section by Parliament 287

Suit for possession involving cancellation of document—Whether separate and additional court-fee payable on the latter .. 17

Page

Taking of finger print or specimen handwriting of an accused person—*Prosecuted under ss* 218 *and* 466, *Indian Penal Code —If amounts to 'testimonial compulsion' and if contravenes Art.* 20(3) *of the Constitution of India.*

The appellant was prosecuted under ss. 218 and 466, Indian Penal Code, before the Additional Sessions Judge at Faizabad. One of the charges against him was in respect of forgery of certain *khataunis*. He denied the disputed entries in the said documents to be in his handwriting. Thereupon sample writing of the appellant was taken by order of the Sessions Judge with a view of its being compared with the writings in the questioned documents by the Government Handwriting Expert and to this he made no objection. The Sessions Judge finally recorded a conviction of the appellant who then preferred an appeal to this Court.

The learned Single Judge hearing the appeal was of opinion that the Division Bench case of *Ram Swarup* v. *State* was wrongly decided and required reconsideration by a Full Bench. He therefore referred the following two questions for decision by a Full Bench:

(1) Is it open to a citizen to waive his fundamental rights conferred by Part III of the Constitution of India?

(2) Does an order requiring an accused person to furnish his finger prints or specimen of his handwriting amount to 'testimonial compulsion' and does such an order contravene the provisions of Article 20(3) of the Constitution of India?

The Full Bench, after considering in detail—

Held (i) that the giving of his handwriting by the accused person does not amount to furnishing evidence against him because the accused is not compelled to testify but "to make an exhibition of facts";

(ii) that in the present case the giving of his handwriting by the accused was a voluntary act and could not, by any stretch of imagination be held to be compelled testimony;

(iii) that the first question referred to the Full Bench does not arise and so far as the second question is concerned, it was answered in the negative.

(*Per* UNIYAL, J.) Held, that the answer to the first question framed must be in the affirmative the right or privilege claimed by the accused is in respect of an individual right and does not involve a question of public policy or public morals.

Rajit Ram *v* State 851

Page

Testimonial Compulsion—Taking of finger print or specimen handwriting of an accused person. If amounts to that 851

Transfer of Property Act, 1882, s. 106—Notice terminating the tenancy and to quit the premises—Signed by a lawyer and purporting to be on behalf of the landlord—Whether effective 678

U. P. General Clauses Act, s. 16—Appointing Authority, power to suspend 732

U. P. Land Acquisition (Rehabilitation of Refugees) Act, 1948—*s.* 11(1) *Proviso—Validity of—Constitution of India, Art.* 31-*B, effect of.*

The High Court having held that the two provisos to s 11(1) of U. P. Land Acquisition (Rehabilitation of Refugees) Act, 1948, was invalid On an appeal to the Supreme Court—

Held, that as a consequence of Art. 31 B read with the Ninth Schedule the Act cannot be deemed to be void or even to have become void on the ground of its being hit by the operation of Government of India Act notwithstanding the fact that the amendment in the Constitution came after the decision of the High Court of Allahabad.

State of U P *v.* H. H. Maharaja Brijendra Singh 236

U. P. Municipalities Act, 1916, s. 69—A (4)—Enquiry by the President into charges framed against Executive Officer—Report submitted to the State Government—Power of the State Government to suspend pending the consideration of the report 732

———s. 87-A—Extension of to the Town Areas under s 38 of the Town Areas Act, 1914, if *ultra vires* 181

———*s.* 87-*A,* (3), (4), (5), *scope of—Procedure for passing of a motion of no-confidence against the President—Art.* 226 *Constitution of India. No confidence motion and notice, legality of*

The interim relief for stay of the holding the meeting for consideration of no confidence motion against the President of the Municipal Board, Sitapur, holding the meeting scheduled for 7th July, 1960, was granted to the petitioner in the writ petition. An order was passed when the main writ petition itself had been decided to the effect that the meeting be held on 22nd July, 1960. The petitioner urged that this Court while fixing the date itself by its order, dated the 15th July, 1960, exceeded its powers and any meeting held in pursuance of it is illegal and that the resolution adopted by it is similarly illegal.

Held (1) that the stay order having been vacated a duty was cast on the court to restore the matters essentially to the posi-

Page

tion they held when the said order had been made, and fur ther to resolve any difficulties which might have intervened as a consequence of the court's action;

(ii) that the language of Art 226 of the Constitution does not admit of any doubt that the power therein conferred on the High Courts is not confined, as has been so often repeated, to the enforcement of the fundamental right alone conferred by Part III of the Constitution but is sufficiently wide It can be exercised for "any other purpose also",

(iii) that the test for its exercise for "any other purpose" is the existence of some legal right vested in the individual who is complaining that the same is threatened or otherwise endangered. If the court is convinced that the party aggrieved is entitled to such a right it will not grudge to invoke its controlling jurisdiction under the Article which in its ambit is not limited by name mentioned in it but it may issue such other or further writ or direction as shall secure the ends of justice;

(iv) that in judging the validity of the impugned order the test, therefore, is whether having regard to the surrounding circumstances including those leading to the making of the interim order and the procedural difficulty following as a result the court has by issuing the particular writ or direction transgressed the limits of Art. 226 of the Constitution whose aim and object is the safeguarding of the legal right belonging to persons;

(v) that the order of this Court did not contravene the provisions of s. 87-A nor was in excess of the powers of this Court.

Krishna Chandra Gupta *v.* Prayag Narain . 252

———s 297—Regulation made under in 1916, before the amending Act of 1953—for affording reasonable opportunity of showing cause against dismissal, removal or reduction, etc. of officers and servants of the Municipal Boards, whether *ultra vires* 767

U. P. (Temporary) Control of Rent and Eviction Act, 1947, s. 3—Permission for eviction by the District Magistrate--Revocation of, whether competent and effects the suit filed before revocation 678

———*s.* 3(1)—*Nature of the order passed by the District Magistrate and his duty—Landlord's right—Nature of the order passed in revision, by the Commissioner.*

The first respondent is the owner of a residential house which is and has been in the occupation of the appellant as the tenant since 1940. In 1958 the respondent applied to the District Magistrate under s. 3(1) of the U P (Temporary) Control of Rent and Eviction Act for permission to file a suit for the

Page

ejectment of the appellant, but that application was rejected and an application for the revision of that order was also dismissed by the Commissioner. The first respondent then filed the writ petition under s. 226 of the Constitution of India which was allowed and the relief sought was granted by the order which is the subject of this special appeal. The court after considering the points raised in the appeal,

Held (i) that it is well settled that the order of the District Magistrate granting or refusing permission under s. 3(1) of the United Provinces (Temporary) Control of Rent and Eviction Act is an administrative order made by him in the exercise of his discretion;

(ii) that for the exercise of any discretionary power to be valid must be in good faith and is not shown to have been misdirected as to the purpose of the Act;

(iii) that it is the duty of the District Magistrate when dealing with an application under s. 3(1) of the U. P. (Temporary) Control of Rent and Eviction Act, to weigh the respective claims of the landlord and the tenant and then to grant or refuse permission,

(iv) that every citizen has a fundamental right to acquire, hold and dispose of property, but property includes leasehold rights and both are subject to reasonable restrictions. A landlord's right to recover possession of property, in the occupation of a tenant is, therefore, subject to the provision of s. 3(1) of the U. P. (Temporary) Control of Rent and Eviction Act;

(v) that the order of the Commissioner in revision stands on a different footing and is of a quasi-judicial nature and therefore liable to be quashed if it suffers from an apparent error of law.

Majeed-uddin *v.* Syed Ghulam Hasnain Naqvi 500

———*ss.* 7(1)(*a*) *and* 7-*A*(1)(2) *and* 7(2) *and rule* 4 *under s.* 17 *of the Act—Contract of tenancy without an allotment order of the District Magistrate about an accommodation which falls within the scope of the Act and in respect of which an order under s* 7 *has been made, if valid and enforceable in law.*

Held, that letting of accommodation in contravention of order passed under s 7(2) of the Act would defeat the provisions of law and would also be against public policy, the consideration is unlawful and the agreement or contract between the parties is void

Held, further, that the contract in suit was void and the assistance of the court would not be given to the plaintiff in enforcing its terms No damages for use and occupation could be allowed to the plaintiff

Shyam Sunder Lal *v.* Lakshmi Narain Mathur 834

Page

U. P. Town Areas Act, 1914, *s.* 38, *sub s.* (1)—*Power of State Government to extend any enactment in force in any Municipality to a town area—Sub-ss.* (3), (4)—*Extension of enactment relating to functions to town area. If, provisions come into force automatically—Extension of s 87-A of U P. Municipalities Act to town area, if* ultra vires.

The petitioner was elected Chairman, Town Area Committee, Saket, constituted under the U. P. Town Areas Act, 1914. On March 9, 1959, he received a notice of a meeting of the Committee on May 1, 1959, to consider a motion of no confidence against him. Thereupon on April 30, 1959 the petitioner moved the present petition for the relief that the scheduled meeting should be interdicted by the Court. The petitioner failed to get any interim relief and in the scheduled meeting the motion of no-confidence was passed. The petitioner then presented an application for the addition to his petition of some fresh grounds of attack and fresh prayer that the respondents should be restrained from carrying into effect the resolution of no-confidence

The learned single Judge before whom the petition came up for hearing referred it to a larger Bench as he doubted whether the case of *Abdul Aziz* v. *State of Uttar Pradesh* had been rightly decided

The Full Bench after considering in detail *held* (i) that sub-s (1) of s. 38 of the U P Town Areas Act, 1914 is in very wide terms, it empowers the State Government to extend to a town area any enactment for the time being in force in any Municipality in Uttar Pradesh, subject to such restriction and modification, if any, as it thinks fit,

(ii) that the purpose and effect of sub ss. (3) and (4) of s. 38 of the U. P. Town Areas Act, 1914 is to make provisions of general application which will, if necessary, come into operation automatically when an enactment which relates to the carrying out of Municipal functions is extended to a town area and the court would not be justified in holding that because sub ss (3) and (4) make provision for the manner of the discharge of functions of a Municipal Board that only those sections of the Municipalities Act can be extended to a town area which relate to such functions,

(iii) that the extension of s 87 A of the U. P Municipalities Act, 1916, to the Town Areas under s 38 of the Town Areas Act, 1914, by the Government notifications, dated May 2, 1956, was not *ultra vires* of the State;

(iv) that the case of *Abdul Aziz* v *The Uttar Pradesh* was rightly decided

Ghulam Mohiuddin *v* Munsif, Etah . . 181

Page

U. P. Zamindari Abolition and Land Reforms Act, 1951, s. 171—Land emerging from the bed of a river by its diluvion action, if falls within the definition of 'land' and if vests in Gaon Samaj 26

Wealth Tax—*Imposition of, on the net wealth of a joint Hindu family—Whether* ultra vires *the Parliament Wealth Tax Act,* 1957, *s.* 3- *Constitution of India,* 1950, *Art.* 248, *VII Schedule List I—Entries nos.* 86 *and* 97.

(*Per* Full Bench, UPADHYA, J., *contra*) S. 3 of the Wealth Tax Act imposing tax on the net wealth of "every individual, Hindu undivided family and company. . . .)" is not *ultra vires* the Union Legislature even in so far as it relates to the levy on 'Hindu undivided family'

(*Per* J. SAHAI, J.) on the ground that the legislation falls and must be upheld under Entry 86 of the Union List viz. "Taxes on the capital value of the assets. . of individuals and companies. . . Inasmuch as a constitution is a mechanism under which laws are to be made and not a mere Act which declares the law, it must be interpreted literally and not in a narrow and pedantic sense" The expression 'individual' in the aforesaid entry comprehends a body of individuals and as such covers 'a Hindu undivided family'

(*Per* GURTU, J.) on the ground that the impugned legislation is not covered by entry 86 of the Union List but it does come and must be sustained under the residuary power of the Parliament under Article 248 read with entry 97 of List I of the VII Schedule in the Constitution The legislative history of taxation laws in India shows that a 'Hindu undivided family' is distinct from an 'individual' and a 'company', and has accordingly been treated and provided for separately. There is, therefore, no reason why this legislative practice and classification should have been departed from in framing entry 86 if the intention was to include 'Hindu undivided family' therein. Recourse may, however, be taken to the residuary power of the Parliament to impose and uphold this taxation.

(*Per* UPADHYA, J) on the ground that the impugned legislation cannot be placed either (as *held* by GURTU, J.) under entry 86 or under Art. 248 read with Entry 97. The implied limitation in residuary power appears to be that the subject sought to be drawn thereunder must be "other than" those already enumerated in List I The residuary power cannot be invoked for expanding the amplitude of the items or entries defined in the List. In entry 86, the area or filed of legislation is expressly delimited and if legislation beyond the delimited area is attempted it is clear that powers are sought to be exercised which are not possessed under the Constitution. The Wealth Tax Act is, therefore, *ultra vires* the Parliament in so far as it imposes a tax on 'Hindu undivided families'.

Jugal Kishore *v* Wealth Tax Officer ... 785

TABLE OF CASES CITED

A

	Page
Abdul Aziz *v.* State of Uttar Pradesh, A.I.R. 1958 All. 109, approved	183, 190, 191
Abdul Ghafoor *v* Abdul Rahman, A.I.R. 1951 All. 845, referred to	5
Abdul Hamid *v* Fatma Begam, 1955 A L. J. 132, referred to	698
Abdul Jabbar *v* Audhesh Singh Ramagyan Singh, A.I.R. 1954 All. 310, relied on	9, 11, 15
Abdul Majid *v.* State, A.I R. 1957 Mad. 551, considered	113
Abdul Rahim *v* State, A I. R. 1956 All. 319, considered	278
Abdul Rahim *v.* Syed Abu Mohomed Barkat Ali Shah, A.I.R. 1928 P. C 16, referred to	5
Abhilakhi *v* Sadanand, (1931) I L R 53 All. 535, overruled	400, 402, 403, 404 406, 410, 413, 414
Adams *v* New York, 192 U S 565, 48 L Ed. 575, considered	879
A G. for Alberta *v* A G. for Canada, L R. [1939] A C. 117, considered	797
A. G. of Ontario *v* A G of Canada, A I R 1947 P C 99, considered	797
Ajit Kumar Maity *v* Narendra Nath Jana, A I R 1955 Cal 221, relied on	9, 10, 15
A K Gopalan *v* State of Madras, 1950 S C.R. 253, considered	38
Ali Sher *v.* State, A. I. R 1960 All. 431, over-ruled	220
A L S P P L Subrahmanyan Chettiar *v.* Muttuswami Goundan, A I R. 1941 F C 47, 55, considered	799, 808, 829
Anderson Ltd *v.* Daniel, L R [1924] 1 K B 138, considered	848
Anderson *v.* Anderson, L R [1895] 1 Q B 753, considered	177
A P Misra *v.* State A I R 1958 Cal 612, referred to	760, 763
Approver (1866) 11 M I. A. 75, considered	824
Arunachalam Chettiar *v* Commissioner of Income-tax, Madras, (1936) 4 I T R 173, 183, referred to	922
Asharfi *v* State, 1960 A L. J. 595, relied on	295, 299
Assistant Collector Customs, Central Excise *v.* Krishna Pillai, A. I R 1956 Mad. 42, relied on	280
Attorney General for Ontario *v.* Attorney General for Canada, L R [1912] A. C. 571, considered	802

Page

Atyam Venkatasubharayudu *v.* Velugoti Govinda Krishna Yachendrulu Yaru, A. I. R 1917 Mad 670, referred to 101

Automobile Transport (Rajasthan) Ltd., *v.* Nathuram Mirdha, A I. R. 1959 Raj 121, disapproved 210

B

Babu Jyoti Bhushan *v* Babu Shiva Prasad Gupta, A I. R. 1943 P C. 205, considered . . 186

Babulal *v.* Ganga Saran A. I. R. 1952 All. 48, relied on 697, 698

Babulal Amthalal Mehta *v.* Collector of Customs, A. I. R. 1957 S C. 877 considered 334

Babu Lal Dhandhania *v* Messrs Gauttam & Co. A.I.R 1950 Cal. 391, considered 9

Babulal Swarup Chand Shah *v* South Satara (Fixed Delivery) Merchants Association Ltd., A. I. R. 1960 Bom. 518 considered 849

Baburao Dhondiba *v* State of Bombay, 58 Bom L. R. 118, referred to 344

Bachan Singh *v* Bhika Singh, A. I. R. 1927 All. 601, considered 152

Badri Das Daga *v* Commissioner of Income tax (1958) 34 I T. R. 11, considered . 923, 924

Badri Lal *v* State A I R. 1960 Raj. 184 considered . 865, 880, 881, 883, 897

Badruddin Abdul Rahim *v* Sita Ram Vinayak Apte, A I R. 1928 Bom 371, referred to . 313

Bafatan *v* Emperor, A I.R 1933 All 617, distinguished 349

Bajnath Prasad Tripathi *v* State of Bhopal, A I.R. 1957 S C. 494, relied on . 421

Bakhtawar Singh *v* State A.I.R 1951 Punj 157, referred to 497

Balraj Bhalla *v* Ramesh Chandra Nigam A I. R. 1960 All. 157, relied on 885

Balthazar *v* Drouin, 1945 S. C. R (Canada) 517, relied on . . 937

Balusu Prabhakara Pattabhi Ramarao *v.* Chintapalli Venkata Subbama, A. I R. 1952 Mad 807, considered . 159

Bansidhar *v* Ganeshi (1900) I L R. 22 All 338, considered 135, 136, 137

Banwari Lal *v* State A I. R. 1956 All 341, referred to 883

Barker *v* Edger L R [1898] A C 748 P C., referred to . 729

Barry *v.* Mercom 12 L Ed. 102, relied on . 937

Bassangouda Yamnappa *v* Emperor A I R 1941 Bom 139, referred to 632

	Page
Behram Khurshed Pessi Kaka *v.* State of Bombay, A I R 1955 S. C. 123, considered	871, 885
Bengal Immunity Co. Ltd. *v.* State of Bihar, (1952) 2 S C R 603 referred to	16
Bhagwan Sahai *v* State of Punjab, A I R 1960 S C 187, relied on	121
Bhagwati Saran *v.* State of U P A I R. 1959 All. 332, considered	764
Bhai Lal *v.* Additional Deputy Commissioner, Akola A I.R. 1953 Nag. 89, dissented from	697
Bhaluka Behera *v* The State, A. I. R 1957 Orissa 172, referred to	896
Bhikaji Narain Dhakras *v* The State of Madhya Pradesh, (1955) 2 S. C R. 589, relied on	783
Bhim Sen *v* State of Punjab A I. R 1951 S C. 481, referred to	174
Bishambhar Rai *v* State, A. I. R 1953 All. 195, considered	278
Bisheshwar Nath *v.* Commissioner of Income-tax Delhi and Rajasthan, A. I. R. 1959 S C 149, considered	871, 885
Blackwood *v* Queen L R [1882] 8 A C 82, referred to	599, 600
Breithaupt *v.* Abram, 352 U. S 432, considered	877, 913
Brij Bhushan Raghunandan Prasad *v* State, A I R. 1957 M P. 106, considered	895
Brij Bhushan Singh *v* Emperor A I R 1946 P C 34, 10, referred to	633
British Coal Corporation *v* The King, A I R 1935 P C 158 considered	788
Brockwell *v* Bullock L R [1889] 22 Q B 567, referred to	729
Brown *v* U S., 356 U S 148, referred to	881
Byron Thornhill *v* State of Alabama, 84 L Ed 1093 relied on	12, 43

C

Carbenes *v.* Powell (1925) 36 C L R 88, 92, referred to	775
C B L Bhatnagar *v* The State, A I R 1958 Bom 196, disapproved	372
C D Hans *v* Mannulal A I R 1952 All. 432, referred to	698
Chamber of Commerce, Hapur *v* The Commissioner of Income tax, 1936 I T. R 397, distinguished	249
Charanjit Lal *v* Union of India, 1950 S.C R 869, referred to	16
Chief Inspector of Stamps *v.* Deputy Commissioner in charge Court of Wards, Shahpur Estate, Gonda, 1947 O W N 281, distinguished	21
Chief Inspector of Stamps *v* Sri Gopalji Maharaj, A.I R 1956 All 168, distinguished	20

Page

Chief Inspector of Stamps *v.* Jashpal Singh, A.I.R. 1958 All. 168, considered not good law 20

Commissioner of Income-tax *v.* Ahmedabad Mill Owners' Association, (1939) 7 I. T. R 369, considered 806

Commissioner of Income tax *v.* Sarwan Kumar, (1945) 13 I. T. R. 361, considered 792, 826

Commissioner of Income-tax *v.* Salem District Urban Bank Ltd., (1940) 8 I. T. R. 269, considered 792, 807

Commissioner of Income-tax *v.* Sodra Devi, A. I. R. 1957 S. C. 832, considered 792

Commissioner of Income-tax *v.* S. R. Subrahmanya Pillai, (1950) 18 I. T. R. 85, 92, referred to 922

Commissioner of Income-tax *v.* Trustees of Sir Currimbhoy Ebrahim Baronetcy, (1933) 33 Bom. L. R. 1549, considered 806

Commissioner of Income-tax *v.* Vyas & Dhotiwala, (1959) 39 I. T. R. 55, distinguished 249

Commissioner of Police, Bombay *v.* Goverdhan Das A. I. R. 1952 S C 16, considered 179

Common Wealth of Massachusett *v.* Andrew Mellon, 262 U. S. 477; 67 L. Ed. 1078, considered 107

Cooverjee B Bharucha *v.* The Excise Commissioner and Chief Commissioner, Ajmer, 1954 S. C. 873, considered .. 339

Corporation Commission of the State of Oklahama *v. Lowe*, 281 U. S. 431: 74 L. Ed. 945, considered 107

C. S. D. Swamy *v.* The State (1960) 1 S. C. R. 461, distinguished 571

D

Daimler Co. Ltd. *v.* Continental Tyre Co. Ltd., L. R. [1916] A.C. 307, referred to 115

Dales case and Engaght's case 6 Q. B. 376, referred to 485

Damodar Ganesh *v.* State, A.I.R. 1951 Bom. 459, relied on ... 41

Dan Singh *v* Additional Collector, A. I. R. 1960 All. 132, referred to 406

Dayanand Modi *v.* State of Bihar, A I R. 1951 Pat. 47, referred to 497

Deo *v.* Suckermore, (1876)/A and F. 703, considered .. 862

Dharamdas Hukumatrai Dorwani *v* State of Bombay, A.I.R 1960 S. C 735, relied on 299

Dharam Singh *v.* Shah Mal Singh, A I.R 1932 All. 20, considered 153

Dhirubha Devi Singh Govil *v.* The State of Bombay, (1955) 1 S. C R. 691, 695, referred to 241

Dost Mohammad *v.* Emperor, A. I. R. 1944 Oudh. 310, disapproved 279

Page

Dr. J. R. Bhatia *v.* Shrimati Victoria Rani Sahiba 1957 A. L. J. 257, relied on 303

Dr. N. G. Chatterji *v.* Emperor 42 Cr. L. J. 876, distinguished 756

Durga Prasad *v.* Ramakant, 1951 A. L. J. 285, relied on 686

Dwarkadass Shrinivas of Bombay *v.* The Sholapur Spinning and Weaving Co. Ltd, 1958 S C.R. 674, considered . 346

Dwarka Prasad *v* Municipal Board, Meerut, A.I R. 1958 All 561, referred to 156

E

Election Commission of India *v.* S. Venkata Rao, 1953 S. C. R. 1144, 1150, considered 80, 86, 88, 98

Emperor *v.* Azmat Shah Khan, (1913) I. L R. 35 All. 374, considered 277

Emperor *v.* Debi Ram, (1924) I L R 46 All. 623, over-ruled . 275, 278, 279

Emperor *v.* Munnalal I.L.R [1942] All. 302 overruled . . 587, 589, 591

Emperor *v* Nga Tun Hlaing, A.I.R. 1924 Rang. 115, relied on 861

Emperor *v.* R. Lingangauda, A I.R. 1944 Bom. 259, distinguished 349

Emperor *v.* Vimlabai Deshpande, A.I.R. 1946 P. C. 123, distinguished . . 348

Empress of India *v* Nilamber Babu, (1879) I L. R. 2 All. 276, considered .. . 277, 279

Empress *v.* Joggessur, (1878) I. L R. 3 Cal. 379, relied on . 278, 281, 282

Eshngbayi (Elecko) *v.* Officer, administrating the Government of Nigeria A. I. R. 1931 P C 248, referred to 486

F

Farid Ahmad *v* State, A. I. R 1960 Cal 32, considered 865, 878, 880, 893, 894

Federal Com. Commission *v.* Columbia B. System 311 U. S. 131, considered 589

Federal Communications Commission *v.* Pottsville Broadcasting Co. 309 U. S. 134=84 L. Ed. 656, referred to . . 698

Fiset *v.* Morin, 1945 S. C. R. (Canada) 520, relied on . 937

F. N. Roy *v.* Collector of Customs, Calcutta, 1957 S. C. R 1151, 1158, relied on . .. 350

Page

Frost *v* Corporation Commission, (1928) 73 L. Ed. 483, distinguished 10

G

Ganga Prasad Kanoo *v.* Emperor 48 Cr. L. J. 357, distinguished 763, 764
Gauri Sahai *v.* Rukko, (1880) I L.R. 3 All. 15, referred to 136, 137
Gauri Shanker *v.* Mumtaz Ali Khan, (1879) I. L. R. 2 All 411 referred to 811
Ghulam Ali *v.* Emperor, A. I. R 1945 Lah. 47, considered 283
Girwar Dayal *v.* Narain Singh, A.I R. 1928 All. 211, considered 153
Gopalan *v.* State of Madras, A.I.R. 1950 S. C. 27, referred to 111
Gould *v.* Stuart L R. [1896] A. C. 575, referred to 527, 551
Governor General in Council *v.* Madras Province, A. I. R. 1945 P. C. 98, considered 799, 829
Greer *v* U S., 245 U. S. 559, considered 701
Gurudeva Narayan Srivastava *v.* State of Bihar A. I. R 1955 Pat. 131, 134, referred to 71

H

Habib Ahmed *v.* Mst. Keoti Kuer, A. I. R. 1946 All. 328, referred to 811
Habibul Razzaq *v.* Shiam Bahadur, A. I. R. 1935 All. 292, considered 157
Hafiz Mohammad Mohsin *v.* Sheo Prasad, (1904) I A. L. J. 309, considered 113
Hamdard Dawakhana *v.* Union of India, A. I. R. 1960 S. C. 554, considered 1
Hamida Bi *v.* Abdul Gaffar A. I. R. 1933 Rang. 147, considered 702, 701
Hans Muller *v.* Superintendent, (1955) 1 S. C. R. 1285, 1289, considered 808
Harihar Singh *v* Nilkanth Singh, A. I. R. 1957 Pat. 865, relied on 283
Hari Shanker Bagla *v.* State of Madhya Pradesh, A. I. R. 1945 S. C 465, relied on 302
Hari Vishnu Kamath *v.* Syed Ahmad Ishaque (1955) 1 S. C. R. 1104, considered 542
High Commissioner for India and High Commissioner for Pakistan *v.* I. M Lal (1948) L R. 75 I. A. 225, considered 532, 534, 536, 553
Himmat Lal *v* State of Madhya Pradesh, A. I. R. 1954 S. C. 403, considered 88
Hira Lal Agarwala *v.* State, A. I. R. 1958 Cal. 123, considered 865, 894

Page

Holt *v* United States (1910) 218 U. S. 245, considered 859, 879

H P. Singh *v* U P Government, A. I. R 1959 S. C. 886, referred to . 968

I

Ibrahim Rahmat-ullah *v.* Emperor, A. I. R 1947 Nag. 23, considered 284

Income-tax Commissioner *v.* Smt. Sodra Devi, A I R. 1957 S. C. 832, considered 822

Inder Mahton *v.* Ram Kishun Missir, A. I. R. 1931 Pat. 409, referred to 404, 412, 414

Indian Immigration Trust Board of Natal *v.* Govindasamy, A. I R. 1920 P C 114, considered 185

Indian Sugar Mills, Association *v.* Secretary to Government, A I. R. 1951 All. 1, referred to 115

In re: Anandan, A. I. R 1952 Mad 117, referred to 497

In re: C P. Motor Spirit Act, A I R 1939 F C, considered 788, 789, 794, 799, 829

In re. Delhi Laws Act, 1951 S. C. R 747, relied on 189, 193

In re: Govinda Reddy, A. I. R. 1958 Mys. 150, referred to . 879, 881

In re: Govinda Reddy, A. I. R. 1960 S C. 29, referred to . 879

In re: Hindu Woman's Right to Property Act, 1937, 1941 F. C R. 12, applied . . 598, 600

In re: Pilani Goundan, A. I. R 1957 Mad. 546, considered 879

In re The Central Provinces and Berar Act no XIV of 1938 1939 F. C. R. 18, 37, referred to . 581

Irvine *v.* California, 347 U S 128, 141, referred to . . 876

Isar Singh *v* Union of India, A.I R 1956 Punj. 19, considered 112

Ishar Singh *v.* State A. I. R 1953 Pep. 111, referred to . 497

J

Jacobson *v.* Massachusetts, (1904) 197 U. S. 643, referred to 38

Jagannath *v.* Champa & Kishen Dei, (1905) I.L.R. 28 All 307, considered 136, 137

Jagat Narain *v.* Sheo Das, (1883) I. L R. 5 All. 311, considered 136, 137

Jai Dayal Madan Gopal, 1933 I. T R. 186, considered 819

Jai Shanker Prasad Shukla *v* Rent Control & Eviction Officer, Kanpur, Civil Miscellaneous Writ no. 583 of 1957, decided on 14th Oct 1957, relied on 303

Page

Jamal Usman Kachi *v.* Firms Umar Haji Karim Shop, A. I. R 1943 Nag 175, considered . . 5, 7, 10, 15

James *v.* Commonwealth of Australia, L. R. [1936] A. C. 578, 614, considered ... 789, 796

Jamna Prasad Raut *v.* Raghunath Prasad, (1913) I. L. R. 35 All. 307, considered 152, 158 166

J. N. Duggan *v.* Commissioner of Income-tax, (1952) 21 I. T. R. 481, considered . 793

John Carlson *v.* People of the State of California, 84 L. Ed. 1104, relied on 42

K

Kalyan Singh *v* Allah Diya, (1918) 16 A. L. J. 964, referred to 114

Kalyan Singh *v.* Tejkaur, First Appeal From Order no. 11 of 1959, decided on 22nd August 1960, relied on .. 937

Kaniram Hazarimull *v.* Commissioner of Income-tax, (1955) 27 I T. R. 294, referred to . . . 821

Karamvir *v.* State, A. I. R. 1954 Pat. 57, referred to . .. 485

Kashi Ram *v.* The Crown, A I. R. 1924 Lah. 75, relied on 282, 285

Kaushal Singh *v.* Ghanshiam Singh, A I. R. 1930 All. 604, considered 849

Khem Chand *v* The Union of India, 1958 S. C. R. 1080, referred to 534, 537

Knight Bridge Estates Trust Ltd. *v* Byrne, L. R. [1940] A. C. 613, considered 186

K. P. Mushran *v.* B. C. Patil, A. I. R. 1952 Bom. 235, considered 174

Kripa Shankar *v.* Banwari Lal, A. I. R. 1952 All. 414, relied on 687, 697

Kshetra Mohan, Sannyasi Charan Sadhu Khan *v.* Commissioner of Excess Profits Tax, West Bengal, (1953) 24 I. T. R 488, considered 821

K Shrinivasomoorthi *v.* Narasimbhulu Naidu, (1927) I. L. R. 50 Mad. 916, considered 280

Kuppala Subbarayudu *v.* Ammavamanchi Venkata Subbamma, A. I. R. 1942 Mad. 375, referred to 159

Kusadhaj Bhakta *v.* Broja Mohan Bhakta, (1916) I. L. R. 43 Cal. 217, referred to 7

L

	Page
Lachhman Das *v.* Commissioner of Income-tax, Punjab, (1948) 16 I. T. R. 35, considered	820, 821
Lala Hai Bhagwan Das *v.* Diwan Chand A.I.R. 1960, M P. 195, considered	284
Lala Ram Rakshpal *v* Surendra Nath 1955 A. L J. 372, relied on	686
Lane *v.* The United States Ex., Rel. Mickadiet 241 U. S. 201=60 L. Ed 958, referred to	697
L. Chiman Lal *v.* Messrs. Banwari Lal Kailash Chand, 1959 A W R. 70, disapproved	304
L. D. Sugar Mills *v.* U P. Government, A. I. R. 1954 All 705, 714, disapproved	393
London and Lancashire Insurance Co Ltd. *v.* Binoy Krishna Mitra, A. I. R. 1945 Cal. 218, relied to	844
Lord Howard De Walden *v.* Inland Revenue Commissioners, [1948] 2 All F R 825, referred to	689

M

Mahabal Singh *v.* Ram Raj, A I. R 1950 All 604, considered	848
Mahabir Prasad Badri Das *v* Yagnik, (1959) 37 I T R 191 assented to	797, 807 810, 823
Mahabir Prasad *v* The District Magistrate of Kanpur 1955 A.L J 252, referred to	698
Mahal Chand *v.* State, A I. R. 1961 Cal 123, referred to	879
Mahanta Singh Natha Singh *v* Het Ram Pakhar, A I R 1951 Punj 27, relied on	285
Mahant Moti Das *v* S P Sahi, A I R 1959 S. C 942, 948, referred to	46
Makhan Singh *v.* State of Punjab, A.I.R 1952 S. C. 27, referred to	484
Malyali *v* Commissioner of Police, A I R. 1950 Bom 202, referred to	497
Management Hotel Imperial, New Delhi *v.* Hotel Workers, Union A. I R. 1959 S C 1342, distinguished	737
Manik Sunder *v.* R S Naidu, A I R. 1947 F C 1, referred to	800
Manohar Lal Nadar Chand *v.* Mohan Lal Gian Chand, A. I R 1957 Punj 72, referred to	698
Mannu Lal *v.* Chakradharhar, 1952 A L. J. 278, relied on	697, 698
Mani Ram *v.* State, A.I.R. 1952 All. 40, distinguished	349
Martin *v* Struthers, (1942) 319 U S. 141=87 L Ed 1313, considered	795

Page

Meghraj Sampat Lall *v.* Raghunath, A.I.R. 1955 Cal. 278, referred to . 9

Mohammad Ali *v.* State of Uttar Pradesh, A. I. R. 1958 All. 681, relied on 299

Mohammad Dastgir *v.* State of Madras, A. I. R. 1960 S. C. 756, considered 868, 875, 887, 893

Mohammad Hanif Khan *v.* State, A. I. R. 1960 All. 134, approved 290

Montreal Street Railway Company *v.* Normandin, I. R. [1917] A. C. 170, referred to . 511

Mou Chand *v.* Ikram Ullah Khan, A. I. R. 1916 P. C. 59, considered . 817

Motipur Sugar Factory Ltd. *v.* Commissioner of Income-tax (1955) 28 I. T. R. 128, referred to 991

Mobile Jackson & Kansas City Railroad Company *v.* J. A. Tennispeed, 55 L. Ed. 78, referred to 313

M. P. Sharma *v.* Satish Chandra, A. I. R. 1954 S. C. 300, considered . 854, 869, 873, 874, 887, 892, 898, 912, 915, 917

M. P. V. Iyer *v.* Commissioner of Income-tax, Madras, (1951) 20 I. T. R. 363, considered 922

Mrs. Bacha F. G. Guzdar *v.* Commissioner of Income-tax, A.I.R. 1955 S. C. 74, referred to 791

Mst. Bhagwan Dei *v.* Murari Lal, 1916 A. L. J. 962, considered 842, 845

Mst. Jileba *v.* Mst. Parmesra, A.I.R. 1949 All. 641, considered 19,24

Mst. Nabban Tawaif *v.* Shyam Lal, approved . 275, 276, 277

Mulchand Hira Lal *v.* Commissioner of Income-tax, (1938) 6 I. T. R. 151, referred to 926

Munshilal *v.* Shambhu Nath Ram Kishan, 1958 A. L. J. 684, considered 690, 700

N

Nandu *v.* Dhasada, 1957 M. P. L. J. 67, considered ... 284

Narain Das *v.* The State, decided by Supreme Court, on 14-9-'60; referred to 406

Narayanamma *v.* Hyderabad State, A. I. R. 1950 Hyd. 68, considered . 489, 497

Page

Narendra Kumar *v.* Union of India, A I R 1960 S C 430, referred to 940

Naresh Chandra *v* State of West Bengal A. I. R. 1959 S. C. 1335, considered . 470, 472

Nathella Sampathu Chetty *v.* Collector of Customs, Madras, A.I.R. 1959 Mad. 142, dissented from 337

Navin Chandra Mafat Lal *v.* The Commissioner of Income-tax, Bombay City, (1955) 1 S. C. R. 829, referred to . 581

Navin Chandra *v.* The Commissioner of Income-tax, Bombay, A. I. R. 1955 S. C. 58, 61, considered . . . 789, 794

N B. Subramanyam *v.* Wealth Tax Officer, (1960) 40 I. T. R 567, assented to . . . 798, 807, 823, 825

Nihal Singh *v.* Sri Ram, A. I. R. 1939 Lah. 388, considered . 157

Nirmal Chakravarti *v.* Land Acquisition Officer, A. I R. 1953 Cal. 257, considered . . 112

Norwich Corporation *v.* Norwich Electric Tramways Co, L. R [1906] 2 K. B. 49, referred to . . . 847

N Sakharai Kannu Pillai, *in re*, A. I. R 1954 Mad 771, relied on 280

O

Om Prakash Gupta *v* State of U. P., 1957 S C. R. 423, referred to 729

P

Pakhar Singh *v.* State, A. I. R. 1958 Punj. 294, considered . 868, 879, 897

Palani Mupan, *in re*: A. I. R 1955 Mad. 495, considered 867

Pal Singh *v.* S T A Tribunal, U. P, A. I. R 1957 All. 254, explained 213

Pamulapati Bhushayya *v.* Kommaraddy Chinnapareddi, A. I. R 1960 A. P. 30, considered 845

Parshottam Lal Dhingra *v.* Union of India, 1958 S C. R. 828, considered . 527, 554, 953, 966

Parvataneni Lakshamayya *v.* Official Receiver, A.I R. 1937 Mad. 551, considered . . . 156, 158, 167

P Balakotaiah *v.* Union of India, A.I.R. 1958 S C 232, referred to 783

Perkins *v.* Lukerns Steel Co., 310 U S. 113; 84 L. Ed 1108, considered . 106

Page

Phoolmal Bros *v.* Commissioner of Income-tax, 34 I. T. R. 61, considered . . 929

Pilani Godan, *in re.*, A. I. R. 1957 Mad. 546, considered 866, 917,

Prakash Chandra *v.* State of U. P., Civil Miscellaneous Writ no. 2740 of 1957, decided on 22nd April 1960, overruled 773

Pratabmull Rameshwar *v.* K. C. Sethia Ltd., A. I. R. 1960 Cal. 702 distinguished 841

Prem Chand Khetry *v.* The State, A. I. R. 1958 Cal. 213, distinguished . . 762

Puranlal Lakhanpal *v.* Union of India, A. I. R. 1958 S. C. 163, considered . . 147, 472

Q

Quebec *v.* Begin, 1955 S.C.R. (Canada) 593, 596, considered 879

Queen Empress *v.* Ahmad, (1886) I. L. R. 9 Mad. 448, considered 279

Queen *v.* Cooty, 1873 U. P. C. 599, considered 872

R

Rachpal Singh *v.* Rex, 50 Cr. L. J. 469, distinguished 756

Rajahmundry Electric Supply Corporation Ltd. *v.* A. Nageshwara Rao, A. I. R. 1956 S. C. 213, referred to 686

Raja Muthu Koil Pillai *v.* Perivasami Nadar, A. I. R. 1956 Mad 632, dissented from .. 880

Raj Naraın Singh *v.* Chairman Patna Administration Committee, Patna, (1955) 1 S. C. R. 290, considered 188

Ramaswami Chettıar *v.* Commissioner of Income-tax, Madras, (1930) I. L. R. 53 Mad., 904, referred to . 925, 929

Ram Dihal *v.* Badrı, A. I. R. 1941 All. 143, referred to 275, 278

Rameshwar Prasad *v.* District Magistrate, A. I. R. 1954 All. 144, considered 87

Ram Gopal *v.* Anant Prasad, A. I. R. 1959 S. C. 851, relied on 209

Ram Krishna *v.* State of Delhi, A. I. R. 1953 S. C. 318, 320, considered 462, 468

Ram Kumar Ram Nivas of Nanpara *v.* Commissioner of Income-tax, (1952) 22 I. T. R. 474, considered 791, 820

Ram Kumar *v.* State of Uttar Pradesh, Civil Miscellaneous Writ no. 3233 of 1958 decided on 22nd September, 1959, relied on 303

Ram Lal Harnam Das *v.* Bal Kishen, A.I.R. 1957 Punj. 139, considered 5, 8

Ram Manohar Lohia *v.* Superintendent, Central Prison, Fatehgarh, A. I. R. 1955 All. 193, referred to 468

Ram Nath Koeri *v.* Lakshmi Devi Sugar Mills, (1956) 2 L. L. J. 11, approved 393

	Page
Ram Prasad *v.* State, A. I R. 1958 All. 159, referred to	279
Ram Pukar Singh *v.* State, 1953 A L. J. 660, referred to .	683
Ram Pukar Singh *v.* State, A. I. R. 1954 All 223, discussed	417, 419, 422
Ramratan Das and Madan Gopal, *in re.*, (1935) I L R 183, considered	816, 819, 820
Ram Singh *v.* Mst. Raghubansa, A. I. R. 1923 Oudh. 3, referred to	844
Ram Swarup *v.* State, A. I. R. 1958 All. 119, considered and relied on	853, 864, 875, 881, 883, 896, 899
Rashid Ahmad *v.* Municipal Board, Kairana, A. I R. 1950 S. C 163, referred to	87, 89
Ratan Chand Khimchand *v.* Dauji Dharsey, A. I. R. 1927 Bom 232, referred to	404, 414
Reilly *v.* The King L. R. [1934] A. C. 176, referred to	527
Re. Khema Rukhad, (1918) I. L. R. 42 Bom. 664, over-ruled	278
Rex *v.* Basudeva, A. I. R. 1950 F. C. 67, referred to .	774
Rex *v.* Broom *ex parte* Cobold; L. R [1901] 2 K. B 157, referred to	110
Rex *v.* Fitzpatrick, [1948] 1 All. E R. 769, considered ..	342
Rex *v.* Manchester Legal Aid Committee, L. R. [1952] 2 Q. B., considered	111
Rex *v.* Richmond Confirming Authority *ex parte* Howitt, L. R. [1920] 1 K. B. 248, referred to	110
R. M. D. Chamarbaugwalla *v.* Union of India, A.I.R. 1957, S C. 628, relied on	335
R M. D. Chamarbaughwala *v.* Union of India, 1957 S. C. R. 930, referred to	46
Rochin *v.* California, 342 U. S 165; 96 L. Ed. 183, considered .	877,913
Roshan Lal *v* Collector of Etah, A.I.R. 1929 All. 525, considered	999
R. N. Seth *v.* Girja Shanker, A. I. R. 1952 All. 419, referred to	698
R. Sanker *v.* The State, A.I R. 1959 Kar. 195, disapproved	372
R. T. Rangachari *v.* Secretary of State for India, (1936) L R. 64 I. A. 40, considered	532, 534 536
R. Venkata Rao *v.* Secretary of State for India, (1936) L R 64 I. A 55, considered	534, 535, 536, 550, 551

S

Page

Sabhapati Dubey v. Ram Kishen Kumar, A. I. R. 1936 Cal. 180, referred to 282

Sagarmal Agarwala v. Emperor, A. I. R. 1944 Pat. 390, relied on 763, 765

Saghu Ahmad v. State of U. P., (1955) 1 S. C. R. 707, referred to 242

Saghir Ahmad v. State of Uttar Pradesh, A. I. R. 1954 S. C. 728 considered 58

Sahibzada Saiyed Muhamed Amin Abbasi v. State of Madhya Bharat, A. I. R. 1960 S. C. 768, referred to ... 77

Sailendra Nath Sinha v. The State, A. I. R. 1955 Cal. 247 considered .. 893

Salomon v. Salomon Company, L. R. [1897] A. C. 22, 38, referred to . 689

Sampat v. Ram Prasad, A. I. R. 1932 All. 499, considered 155, 165

Sardara v. Buta, A I R. 1950 Lah. 148, relied on 283

Satish Chandra Chakrobarty v. P. N. Das & Co., A.I.R. 1938 Pat. 231, referred to . 9

S. A. Venkataraman v. The Union of India, 1954 S. C. R. 1150, referred to 534, 536

Sawyer v. U. S., 202 U. S. 150, 50 L. Ed. 972, referred to 884

Secretary Advocates' Association v. Phool Din, I. L. R. [1958] 1 All. 930, relied on 136

Secretary of State for India in Council v. Hindustan Co-operative Insurance Society Limited, (1931) L. R. 58 I. A. 259, 267, distinguished 348

Seward v. Vera cruisly, L. R. [1884] 10 A. C. 59, referred to 729

Shafian v. Hamidullah, A. I. R. 1916 All. 332, considered 152

Shailendra Nath Sinha v. State, A. I. R. 1953 Cal. 267, considered 861

Shanker Lal v. Toshanpal Singh, A. I. R. 1934 All. 558, referred to 790

Shanker Sahai v. Din Dial (1889) I. L. R. 12 All. 409, referred to 729

Sharan Behari Lal v. Kanhaiya Lal, A. I. R. 1953 All. 276, considered .. 842

Shenton v. Smith, L. R. [1895] A. C. 176, referred to . 527, 550

Sheoshanker v. State Government of Madhya Pradesh, A.I.R. 1951 Nag. 58, referred to . 337

Shiam Lal v. Mst. Sahodra Devi, 1960 A. L. J. 177, considered 144, 153, 156, 162

Shibban Lal Saxena v. State of Uttar Pradesh, A. I. R. 1954 S. C. 179, referred to . 468

	Page
Short *v.* Poole Corporation, L. R [1926] 1 Ch. 66, 90-91, considered	730
Shri Krishna *v.* Additional Commissioner, Allahabad, 1958 A.L.J 234, relied on	697, 698
Shriram Shaligram Shop *v.* Laxmibai, A.I.R 1951 Nag. 143, referred to	9, 10
Shyam Lal *v.* Collector of Agra, A I. R. 1934 All. 239, considered	1,000
Sisir Kumar *v.* J. N. Majumdar, A. I R. 1955 Cal. 309, considered	112
S. Moses *in re*: I. L R. [1959] Mad. 418, over-ruled	607
Smt Kamla Devi *v.* Sunni Central Board of Waqfs, U P Lucknow, A. I. R. 1949 All 63, relied on	19
Sochneidermfan *v.* U. S., (1942) 320 U. S. 118=87 L Ed. 1796 referred to ...	795
Sokkanadha Vannimundai *v.* Sokkanadha Vannimundai, (1904) I L R. 28 Mad 344, considered	828
Somu Pillai *v.* Krishna Pillai, A. I R. 1924 Mad. 899, referred to	279
South Carolina *v.* United States (1905) 199 U S 137, referred to	583
S. S Saraswati *v.* Jailor-in-charge, District Jail, Banaras. 1951 A L. J. 255, relied on	493
State of Bihar *v.* Abdul Majid 1954 S C. R 786, referred to	527
State of Bihar *v.* Sir Kameshwar Singh A I R 1952 S C 252, considered	808
State of Bombay *v.* Ali Gulshan, A I R 1955 S C 810, considered	178
State of Bombay *v.* F N Balsara, 1951 S C R 682, referred to	16
State of Bombay *v.* F M Balsara, A I R 1951 S C 318 considered	794
State of Bombay *v.* P Vinayak, A I R. 1951 Bom 263 distinguished	349
State of Bombay *v.* R. M. D. Chamarbaugwalla, A I R 1957 S C 699, relied on	335
State of Bombay *v.* United Motor (India) Ltd, A I R. 1953 S. C. 352, referred to	88
State of Kerala *v.* G M Francis & Co., Civil Appeal in 279 of 1959, decided on 13th December, 1960, referred to	729
State of Kerala *v.* K K Sankaran Nair, A I R. 1960 Ker 392, considered	867, 895
State of Kerala *v.* Sankaran Nair, A I R 1960 Ker 392, referred to	874, 878, 880, 884, 895

Page

The State of Madhya Pradesh *v.* Veereshawar Rao Agnihotry 1957 S C. R. 868, referred to . 729

State of Madras *v.* Gannon Dunkerley & Co. Ltd., 1959 S C. R. 379, referred to 583

State of Orissa *v* Madan Gopal Rungta, A.I.R. 1952 S. C. 12, considered 79, 80, 81, 88, 89, 111

State of U. P *v.* Manbodhan Lal Srivastava, 1958 S. C. R. 533, 545, referred to 543, 544

State of West Bengal *v.* Subodh Gopal Bose, 1954 S. C. R. 387, referred to . 341

State *v* Abu Ismail Merchant, A. I. R. 1959 Bom. 408, considered 866, 878 879

State *v.* Gopala Rao, A.I.R. 1954 Mys. 117, referred to 881

State *v* Parameshwaran Pillai, A. I. R 1952 T. C. 482, referred to 875, 879

State *v* Ram Kumar Ram Gopal, A I. R. 1957 M. P. 73, considered 895

Suba Singh Kure Singh *v.* Neki Kishan Sahai, A.I.R. 1953 Punj. 106, referred to . . 404, 414

Subayya Gounder *v* Bhoopala, A. I. R 1959 Mad. 396, considered 879

Sundrabai Sitaram *v.* Manohar Dhondu, A.I.R. 1933 Bom. 262, considered 845

Surajmal Marwadi *v* Mohanlal Surajmal Marwadi, A.I.R. 1938 Nag 366, considered 160

Suraj Mull Nagoremull *v.* Triton Insurance Co., (1924) L. R. 52 I A. 126, referred to . . 847

S. V Parulekar *v* District Magistrate, Thana, A. I. R. 1957 S. C 23, 27, considered 117, 470, 471

Swaminalingam Chettiar *v.* Assistant Inspector of Labour, A.I.R. 1957 Mad. 716, relied on 883

T

Talewar Jha *v* Mool Chand, A I. R 1959 All. 96, disapproved 272, 279

Taparada De *v* State of West Bengal, A. I R. 1951 S. C. 174, referred to 474

Tarini Kumar Pandey *v.* The State, A. I. R. 1960 Cal. 318, considered 894

Tennessee Electric Power Co. *v.* Tennessee Valley Authority 306 U S 118, 832, L Ed. 342, considered 102, 112

Page

Terreu *v.* Secretaiy of State, [1953] 2 All. E R. 490, referred to . 527

Thakur Amar Singh *v.* State of Rajasthan, A I.R. 1955 S. C. 304, referred to . 5, 6

The Indian Sugar Mills' Association *v.* The Secretary to Government, Uttar Pradesh, 1950 A.L.J. 767, relied on . 58

The Queen *v.* The Commissioner of Inland Revenue *in re* Nathan, L. R. [1884] 12 Q. B. 461, 473, considered 57

The Superintendent, Central Prison, Fatehgarh *v* Ram Manohai Lohia, A. I. R 1960 S. C. 633, considered . 49

The United States Ex. Rel. Knight *v* Lane, 228 U. S. 6=57 L. E. 709, referred to . 697

Tillumanus & Co. *v.* S S Knutsford Ltd., L R. [1908] 2 K. B. 385, 399, considered . . . 177

T Nagappa *v* T C Basappa, A. I R 1955 S C. 756, considered 78, 86, 89

Triloki Prasad *v* Kunj Behari Lal, A. I R 1935 All. 448, considered . 144, 155, 162,165

Twinning *v* New Jeisey, 211 U S 78; referred to 873

U

Udai Pratap Gir *v.* Shanta Devi, A.I.R. 1956 All 492, relied on 19

Udharam Dalumal *v* Rozishambe, A I R 1939 Sind 96, considered . .. 159

Ullmann *v.* U. S 422 U S 427; 100 L Ed. 511, 519, considered 874

Union of India *v* Messrs Bhanamal Gulzari Mal (1960) 2 S. C. R 627, applied 746, 753

United Provinces *v.* Atiqa Begam, A. I. R 1941 F. C. 16, considered 788, 789

United States *v* Classic, (1940) 313 U. S. 299, 85 L. Ed 1365, considered . . 795

U. Po Hla *v.* Ko Po Shein, A I. R 1929 Rang. 97, referred to 274

U S. *v.* Monia, (1943) 317 U. S 424, considered . . 872

U. S. *v.* Mullaney, (1887 cc) 32 F. 370, considered 882

U S. *v* Murdock, (1931) 284 U. S. 141, considered . . 872

V

Veerappa Pilli *v.* Raman & Ramfan Ltd., A. I. R. 1952 S. C. 192, considered 114

Venkatasubarayadu *v.* Sri Rajah Krishna Yachendrulu Varu Bahadur, (1915) I. L R. 40 Mad. 651, referred to 414

Pa

Villiam Mal Ammal *v.* Periaswami Udyar, A. I. R. 1959 Mad 510, relied on 9

Vimal Kishore Mehrotra *v.* State of Uttar Pradesh, A I R 1956 All 56, considered 11,

W

Wal Chand Jasraj *v* Hari Anant Joshi, (1932) I. L. R 56 Bom. 369, considered 278, 28

Waman Shrinivas Kini *v* Rati Lal Bhagwandas Co. A I R. 1959 S. C. 689, considered 8

W D Manley *v* State of Georgia, 73 L. Ed. 575, referred to 34

Western India Theatres *v* Cantonment Board, A. I R 1959 S. C 145, 153, considered 86

Wilson *v* U. S., 221 U. S. 361, 392, referred to 87

THE
INDIAN LAW REPORTS
ALLAHABAD SERIES

APPELLATE CIVIL

*Before Mr. Justice Nigam and Mr. Justice Misra**

WAHID HUSAIN, SYED (PLAINTIFF)

v.

MAHARAJKUMAR MAHMUD HASAN KHAN AND OTHERS (DEFENDANTS)

959

December, 9

Arbitration Agreement under an unregistered partnership— *Enforcement of, whether by the Partnership Act—Indian Arbitration Act,* 1940, *s.* 29—*Indian Partnership Act,* 1932, *s.* 69 (3).

The applicant filed an application in the trial court under s. 20 of the Arbitration Act, 1940, praying that the agreement to refer the dispute between the parties for decision by arbitrator be ordered to be filed in the court and the court be pleased to nominate an arbitrator to get the dispute so decided. The firm was unregistered. The issue was whether this application was barred by s 69 of the Indian Partnership Act.

Held, that an application under s. 20 of the Indian Arbitration Act for enforcing an arbitration agreement in respect of an unregistered partnership is barred by the provisions of s. 69 (3) of the Indian Partnership Act, falling, as it does, within the term "other proceedings" included therein.

Case law discussed

First Appeal from Order No. 43 of 1954 from an order of P. M. Harkauli, Civil Judge, Lucknow, dated 30th March, 1954.

The facts appear in the judgment.

S. N. Roy, for appellant.

*Sitting at Lucknow.

1959

WAHID HUSAIN SYED v. MAHARAJ KUMAR MAHMUD HASAN KHAN

Asghar Husain and *Omesh Prasad*, for respondent no. 2.

The judgment of the court was delivered by -

NIGAM, J.- On 25th August, 1951, Wahid Husain filed an application under section 20 of the Indian Arbitration Act (Act X of 1940) in court of the Civil Judge, Lucknow, praying that the agreement to refer the disputes between the parties contained in the partnership deed, dated 18th March, 1947, be ordered to be filed in the court and the court be pleased to nominate an arbitrator for the opposite-parties or to appoint an arbitrator to decide the disputes between the parties. In the alternative it was prayed that the writings in paragraph 10 of the application be treated as an arbitration agreement and be ordered to be filed in the court and the court be pleased to nominate an arbitrator for opposite-party no. 1 to decide the disputes between the parties.

The facts alleged in the application are that Wahid Husain applicant and the three opposite-parties entered into a partnership for a period of ten years by a registered deed, dated 18th March, 1947, for trading in motor cars and for other allied purposes. The 21st clause of the partnership deed provides that-

> "Any dispute or difference which may arise between the partners or their representatives, with regard to the construction meaning of this deed or any part thereof, or respecting the accounts, profits or losses of the business or the rights or liabilities of the partners under the deed or the dissolution or winding up of the business or any other matter relating to the firm shall be referred to four arbitrators, one to be nominated by each party and in case of difference of opinion between them by the Umpire selected by the arbitrators."

The firm named National Motor (India) started business under the management of the applicant and it was stated that the firm was still continuing. Then followed an account of the disputes between the parties and it was stated that in view of the provisions of paragraph 21 the parties referred their dispute to a Board of four arbitrators but the said arbitration ended in fiasco partly as the arbitrators were unable to finish the arbitration within the period of four months allowed under the arbitration Act. Then the parties were asked to name their arbitrators but opposite-party no. 1 has refused to do so. The valuation of the application for purposes of jurisdiction as put at Rs.20,000.

Written statements were filed by the three opposite-parties on 16th November, 1951, 17th December, 1951 and 16th November, 1951 respectively. The plaintiff then moved an application for amendment and this was allowed by the court's order dated the 2nd December, 1952. Additional written statements were filed by opposite-parties 1 and 2 on the 16th January, 1953 and then the matter came up for arguments.

The learned Civil Judge framed the following three issues:

1. Is this application barred by section 69 of the I. P. Act?

2. Was the agreement never given effect to? If so, its effect?

3. To what relief is the plaintiff entitled?

The learned Civil Judge decided that the application before him was barred by the provisions of section 69 (3). He further held that issue no. 2 did not arise for determination as the matter was really a question of the merits of the case. Accordingly, the learned Civil Judge held that the applicant was not entitled to any relief and dismissed the application with costs.

1959

WAHID HUSAIN SYED v. MAHARAJ KUMAR MAHMUD HASAN KHAN

Nigam, J.

Against that order this first appeal from order has been filed by Wahid Husain the applicant The matter came up before a learned single Judge of this Court and he was of the opinion:

> "The matter does not appear to be free from difficulty. It requires a consideration of some Bench cases of the Allahabad High Court It also appears to me to be a question of importance and it is likely to arise in a number of cases in future."

He, therefore, referred the matter to a Bench and as this was the sole question arising in the case he has referred the entire case for decision to a Division Bench. The appeal has now been placed before us for decision.

In this appeal we have heard the learned counsel for the parties.

No authority directly on the point was cited before the learned Civil Judge and he was assured that there was no authority on the point He then considered the provisions of the section and held that as an application under section 20 of the Arbitration Act was clearly a mode of action prescribed by the Arbitration Act for carrying into effect a legal right of a party to have a dispute decided by a private forum, the application amounted to a proceeding within the term of sub-section (5) of section 69 of the Indian Partnership Act (Act IX of 1932). No question of the word "Proceeding" being *ejusdem generis* to "a claim of set off" was raised before the learned Civil Judge. In the grounds of appeal other questions were also raised. We have questioned the learned counsel for the appellant and he has made a statement before us that he is not pressing any other argument or contention before

us except the argument to be discussed by us in the paragraphs following. The alternative argument urged by the learned counsel for the opposite-parties before the learned single Judge that if the present application is not covered by the word "proceeding" mentioned in sub-section (3) of section 69 of the Partnership Act then the present application amounts to a suit and should therefore be treated as barred under sub-section (1) and (2) has also not been pressed before us. The analogy of petitions under the U. P. Agriculturists Relief Act and the U. P. Encumbered Estates Act is not available to the learned counsel inasmuch as both those applications are followed by decrees and not mere orders. Besides, in the section the words "suit" and "proceedings" have both been used and it is, therefore, crystal clear that the Legislature must have meant different things when it used different words. This argument not having been raised before us need not be considered by us. We now proceed to consider the question raised before us as to whether an application under section 20 of the Indian Arbitration Act is a "Proceeding" within the meaning of the word as used in sub-section (3) of section 69 of the Indian Partnership Act.

Before quoting the words of the section, we will refer to the rulings relied upon by the learned counsel for the parties in support of their contentions. The learned counsel for the applicant has relied on *Abdul Rahim* v *Syed Abu Mohomed Barkat Ali Shah* (1), *Jamal Usman Kachi* v *Firm Umar Haji Karim Shop* (2), *Abdul Ghatoor* v. *Abdul Rahman* (3), *Thakur Amar Singh* v. *State of Rajasthan* (4) and *Ram Lal Harnam Dass* v. *Bal Krishen* (5). Out of these rulings, three need not detain us long. The case of *Abdul*

(1) A I.R 1928 P. C. 116. (2) A I R 1943 Nag 175
(3) A I R. 1951 All 845. (4) A I.R. 1955 S. C. 594.
(5) A I.R. 1957 Punj. 159

1959

WAHID HUSAIN SYED v. MAHARAJ KUMAR MAHMUD HASAN KHAN

Nigam, J.

Rahim v. *Syed Abu Mohomed Barkat Ali Shah* (*supra*) interprets the words "further or other relief" in clause (*h*) of section 92 of the Civil Procedure Code as meaning reliefs of the nature of those mentioned in clauses (*a*) to (*g*) of the same section. The Allahabad case of *Abdul Ghafoor* v. *Abdul Rahman* (*supra*) similarly interprets the words "other sufficient grounds" in Order 23, rule 1(2) (*b*) of the Code of Civil Procedure as covering grounds analogous to those mentioned in rule 1(2)(a). The Supreme Court case of *Thakur Amar Singh* v. *State of Rajasthan* (*Supra*) only states the true scope of the rule of *ejusdem generis*. In paragraph 38 their Lordships rejected the contention that the word "jagir" occurring in Article 31-A of the Constitution should be read *ejusdem generis* with other similar grants for the reasons that—

> "The rule of *ejusdem generis* is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified and and not its reverse, that specific words which precede are controlled by the general words which follow."

There is no dispute before us as to the proper application of the rule of *ejusdem generis*. The question plain and simple is whether the words "other proceeding" occurring in sub-section (3) of section 69 are to be interpreted as meaning proceedings similar to "a claim of set-off" or whether these words are to be taken as covering an entirely different set of proceedings.

In the other two rulings relied upon by the learned counsel the words "other proceeding" were interpreted as being *ejusdem generis*. In *Jamal Usman Kachi*

v. *Firm Umar Haji Karim Shop* (1) the Division Bench held as follows:

"What is contended before us is that the words 'or other proceeding to enforce a right arising from a contract' in sub-section (3) refer to a particular class of decrees, namely consent decrees, which are by their very nature contracts, and authority for the proposition is sought in *Kusadhaj Bhakta* v. *Broja Mohan* (2). . . . . NIYOGI, J. held that the point taken would be a sound one if the consent decree had been attacked as a contract; that is to say, if any application had been made to attack it on the ground of fraud, undue influence or mistake which would vitiate the contract. Admittedly no such allegation has ever been made or is made now, and the only allegation is that it was the intention of the Legislature that an unregistered firm should be under the same disability in respect of this particular limited kind of decrees as it is in respect of bringing suits. We do not consider that that is the intention of the section or that the words used can bear that implication. . . In our opinion the words 'other proceedings to enfroce a right arising from a contract' are to be taken as *sui generis* of a claim of set-off, that is to say, when sub-sections (1) and (2) relate to the right of bringing a suit the opening words of sub-section (3) relate to the right of setting up a defence and have no relation to the entirely different question of a claim to enforce the execution of a decree. Not only may a claim of set-off be a partial defence to a suit but a claim arising out of a contract may be set up in defence to negative the right of suit altogether, and it is these claims in defence which, in our opi-

(1) A.I.R. 1948 Nag. 175. (2) 43 Cal. 217.

1959

WAHID HUSAIN SYED v. MAHARAJ KUMAR MAHMUD HASAN KHAN

Nigam, J.

> tion, are placed under the same disabilities as the right to bring a suit at all in so far as unregistered firms are concerned In our opinion, sub-section (3) of section 69 has no application to the execution of decree"

It does not appear to have been brought to the notice of the learned judges, as pointed out in a Calcutta case to be referred to by us subsequently, that the proceedings in execution were excluded from the operation of section 69 by the terms of sub-section (4) (*b*). Strictly speaking, the question of interpreting the words "other proceeding" was not before their Lordships and the opinion expressed by them must, therefore, be considered to be an obiter. This is, however, we submit, entitled to great weight.

The last ruling relied upon by the learned counsel for the appellant is *Ram Lal Harnam Dass* v. *Bal Krishen* (1). This is a single Judge ruling. The words " or other proceedings" occurring in section 69 (3) of the Indian Partnership Act came up for interpretation before the learned single Judge. He was of the opinion that the words "other proceeding" can not be read to mean "other proceedings in the suit". He attached considerable weight to the fact that there was nothing common between the word "set off" and the word "other proceeding". He expressed himself thus:

> "I do not understand why the Legislature should use these very two different matters in juxtaposition. The necessary inference is that the use of these two terms was intended to convey same kind of matter. Moreover, if it is correct that the bar laid down in section 69 is applicable to all kinds of judicial proceedings then it is not understood

(1) A.I.R. 1957. Punj. 159

why a specific mention is made in sub-section (3) of a claim for set-off because this claim would also be covered by "other proceeding" and there is no reason why the Legislature should have particularly emphasized a claim for set-off".

Then following the rule of *ejusdem generis* the learned Judge, held—

> "I am, therefore, of the opinion that the words 'or other proceeding' in section 69 (3) relate to the proceedings of the nature of set-off and nothing else."

The learned Judge also referred to the Nagpur Division Bench case but the Calcutta case in which it was specifically dissented from does not appear to have been brought to the notice of the learned Judge.

The learned counsel for the respondents has relied on six rulings They are *Satish Chandra Chakrobarty* v. *P. N. Das & Co.* (1), *Babulal Dhandhania* v *Messrs. Gauttam & Co.*, (2) *Shriram Shaligram Shop* v. *Laxmibai,* (3) *Abdul Jabbar* v. *Audhesh Singh Ram Agyan Singh,* (4) *Ajit Kumar Maity* v. *Narendera Nath Jana,* (5) and *Meghraj Samphatlall* v. *Raghunath* (6). The Patna case and the last case relied on by the learned counsel do not help the respondents case to any material extent and we need not refer to it in any detail. In *Babulal Dhandhania* v. *Messrs. Gautam & Co.* (2) the learned Judge stated:

> "In my view the word 'proceeding' in section 69 (3) means something in the nature of a suit that is a proceeding which is instituted or initiated in a court."

(1) A I.R. 1938 Pat. 231
(2) A.I R. 1950 Cal. 391.
(3) A.I.R. 1951 Nag. 143
(4) A I R. 1954 All. 310
(5) A I.R. 1955 Cal. 224.
(6) A.I R. 1955 Cal 278

1959

WAHID HUSAIN SYED v. MAHARAJ KUMAR MAHMUD HASAN KHAN

Nigam, J.

In paragraph 23 of the judgment he stated:

> "On the merits the question raised is one of the proper construction of section 69, Partnership Act. Under sub-section (3) the provisions of sub-sections (1) and (2) shall apply also to proceedings to enforce a right arising from a contract."

He then assumed that "a reference to arbitration is a proceeding to enforce a right within sub-section (3)." That was a case of a reference outside the court and as such the matter before the learned single Judge was whether a reference to arbitration outside the court is a "proceeding" and strictly speaking the matter before us did not arise before the learned Judge. It is, however, worthy of note that the learned single Judge did not interpret the word "proceeding" as being restricted to or something analogous to the preceding word "set-off". The case of *Shriram Shaligram Shop* v. *Laxmibai* (1) does not help the learned counsel's case.

In *Ajit Kumar Maity* v. *Narendra Nath Jana* (2) a Divisional Bench of the Calcutta High Court distinctly took a view contrary to the view taken in *Jamal Usman Kachi* v. *Firm Umar Haji Karim Shop* (3). Discussing the effect of section 69 it was stated:

> "The first effect of the extension of the provisions of sub-sections (1) and (2) by sub-section (3) is that if a defendant claims set off on the basis of a partnership, he will be debarred from doing so unless the partnership is registered.
>
> The next effect is that if any person is by any proceeding' seeking 'to enforce a right' arising from a contract on the basis of a partnership he will be debarred from doing so, unless the partnership is registered. . . . In my judgment, the written

(1) A.I.R. 1951 Nag. 143 (2) A.I.R. 1955 Cal. 224.
(3) A.I.R. 1943 Nag. 175.

statement as such is in the first place not a proceeding 'contemplated in sub-section (3) In the second place it cannot, in my judgment, be properly said that by setting up a plea to defeat the plaintiff's claim a defendant can be said to be seeking to enforce a right arising from a contract.' A party can be said to be seeking to 'enforce a right' only if he is seeking some relief from the court. Where no relief is being sought from the court, it cannot be said that he is seeking to enforce a right."

Thus on the language of the section, it was held that a "proceeding to enfroce a right" does not mean anything in the nature of a set-off and thus by inference it was held that the words "other proceeding" should be interpreted independently of the word "set-off" and not as *ejusdem generis* to that term.

This view further finds support from *Abdul Jabbar* v. *Audhesh Singh Ram Agyan Singh* (1). Then a claim by the creditors in respect of a *sarkhat* in Encumbered Estates Act proceedings was held to be a "proceeding" to enforce a right arising from the contract. Their Lordships stated:

"Our attention has, however, been drawn to sub-section (3) of section 69 which makes the provisions of sub- sections (1) and (2) of that section applicable even to a claim of set-off or other proceeding to enforce a right arising from a contract. It is obvious that the claim by the appellants in these Encumbered Estates Act proceedings for determination of the liability of the landlord to them and for passing a decree in respect of the amount found due is a proceeding to enforce a right arising from the contract."

(1) A I R. 1954 All 310.

1959

WAHID HUSAIN SYED v. MAHARAJ KUMAR MAHMUD HASAN KHAN

Nigam, J.

It was then not pleaded that the words "other proceeding" were restricted in their meaning by the word "set-off" which preceded them but the implication is clear that what their Lordships held was that the words "other proceeding" were not so controlled.

We will now come back to the terms of section 69 of the Indian Partnership Act. The section reads:

> "69. *Effect of non registration* (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in the firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm
>
> (2) No suit to enforce a right arising from a contract shall be instituted in any court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.
>
> (3) The provisions of sub-sections (1) and (2) shall apply also to a claim of set-off or other proceeding to enforce a right arising from a contract, but shall not affect—
>
> "(*a*) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or
>
> (*b*) the powers of an official assignee, receiver of court under the Presidency towns Insolvency Act, 1909 (II of 1909), or the Provincial Insolvency Act, 1920 (V of 1920) to realise the property of an insolvent partner,

(4) This section shall not apply—

(*a*) to firms or to partners in firms which have no place of business in the territories to which this Act extends or whose places of business in the said territories are situated, in areas to which, by notification under section 56, this Chapter does not apply, or

(*b*) to any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency-towns, is not of a kind specified in section 19 of the Presidency Small Cause Courts Act, 1882 (XV of 1882), or, outside the Presidency-towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 (IX of 1887), or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim."

It is clear that sub-section (4) directs that this section is not to apply to certain firms or partners in those firms [clause (*a*) or sub-section (4)]. It is also not to apply to certain small suits and claim of set-off [clause (*b*) of sub-section (4)] In addition, this section is also not to apply to proceedings in execution [clause (*b*) of sub section (4)] or other proceeding incidental to or arising from any such suit or claim [clause (*b*) of sub-section (4).] There are two exceptions contained in clauses (*a*) and (*b*) to sub-section (3). It is stated that the provisions of sub-sections (1) and (2) shall not affect the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm or the right to realise the property of a dissolved firm. It is also not to affect the powers of an official assignee under the Insolvency Act. These two clauses (*a*) and (*b*) of sub-

1959

WAHID HUSAIN SYED v. MAHARAJ KUMAR MAHMUD HASAN KHAN

Nigam, J.

section (3) are not general exceptions to the rule laid down in sub sections (1) and (2) of section 69; for otherwise they should have been placed in sub section (1). The fact that they are placed as exceptions to sub section (3) makes it clear that the reference is to the words "other proceeding". If that is so then the words "other proceeding" have to be interpreted in a manner so as to include the matters in sub-clause (*a*). Once that is done, it is clear that the words "other proceeding" are not to be interpreted as *ejusdem generis* to the word " set off " and must be interpreted independently. It is conceded that once that is done, i.e., the meaning of the words "other proceeding" is not to be controlled by the preceding word "set off", an application under section 20 of the Indian Arbitration Act would be within the purview of the term "other proceeding"

The argument that if the legislature had intended that a "proceeding to enfroce a right arising from a contract" was barred then the words "other proceeding" should have found a mention immediately after the words "no suit" in sub-sections (1) and (2) of section 69 does not appeal to us; for had that been so, the exceptions in clauses (*a*) and (*b*) would have applied also to suits and not only to other "proceeding". It appears to us that the intention clearly was that the exceptions in clauses (*a*) and (*b*) of sub-section (3) will not apply to suits but will apply only to "other proceeding". We have also not found any justification in the language used for the contention that the terms of sub-section (3) are restricted to written statements. It is certainly a little tempting to hold that sub-sections (1) and (2) of section 69 apply to plaints and similar applications claiming any particular relief in the nature of a decree and to restrict sub-section (3) to written statements. We are, however, of opinion on a consi-

deration of the language of sub-section (3) that it is clear that it was not the intention of the Legislature to restrict the operation of sub section (3) only to set off or other similar claims to be made in a written statement

We find support for our view not only in the Calcutta case of *Ajit Kumar Maity* v. *Narendra Nath Jana* (1) (*supra*) which specifically dissented from the view taken in *Jamal Usman Kachi* v. *Firm Umar Haji Karim Shop* (2) but also in a Division Bench case of our own Court in *Abdul Jabbar* v. *Auchesh Singh Ram Agyan Singh* (3) even though the question was not so pointedly discussed then we are of opinion that the use of the word "or" in sub section (3) indicates that the Legislature had two separate categories of proceedings, one in the nature of set-off and the other for the purpose of enforcing a right arising from a contract, in its view and that there is no sufficient reason for restricting the wide meaning attaching to the words 'other proceeding". In this view we are also fortified by the consideration that the Legislature intended generally to refuse assistance of courts to the enforcement of rights arising from a contract of partnership when that partnership had not been registered and was required to be registered under the law then enacted. If the assistance of the court is to be denied for suits for enforcing a right arising from a contract in the case of an unregistered partnership there is no reason why that assistance should be available indirectly and the parties should be permitted to get round the law merely by including a clause for reference to arbitration of disputes and the enforcing that clause of arbitration with the assistance of the court.

(1) A I R. 1955 Cal. 224. (2) A.I.R 1943 Nag.175
(3) A.I R. 1954 All. 310.

1959

WAHID HUSAIN SYED v. MAHARAJ KUMAR MAHMUD HASAN KHAN

Nigam, J.

On a full consideration of the facts of the particular case before us, we are of opinion that an application under section 20 of the Indian Arbitration Act to enforce "a right arising from a contract" in respect of an unregistered partnership is barred under the provisions of section 69 (3) of the Indian Partnership Act.

No other point has been pressed before us.

We are, therefore, of opinion that there is no force in this appeal. We dismiss it with costs.

Appeal dismissed

APPELLATE CIVIL

Before Mr. Justice Beg and Mr. Justice Mathur

MOHAMMAD HABIBUR RAHMAN KHAN AND ANOTHER (PLAINTIFFS)

v.

ABDUL QADIR FARUQI AND OTHERS (DEFENDANTS.)

1960 *January*, 22

Court-fee—*Suit for possession involving cancellation of document—Whether separate and additional court-fee payable on the latter—Court Fees Act*, 1870 (*as amended by and in its application to Uttar Pradesh*), *s.* 7(*iv-A*).

A instituted a suit for possession on the basis of a perpetual lease in her favour by *X*. The defence was that *X* had previously executed a deed of *waqf* followed by a gift deed whereby she divested herself of all the interests she had in the property in suit with the result that *X* had no right to execute the lease in favour of *A*. The question was whether court-fees was leviable on both the counts for possession and cancellation of the deed.

Held, that court-fee under s. 7(iv-A) of the Court Fees Act is payable wherever the relief sought cannot be granted without cancellation of or adjudging void or voidable a decree or instrument securing property having market value, and such court fee is payable over and above the court-fee payable for the other relief of possession

Case-law discussed.

First Appeal from Order No. 14 of 1953 from an order of H. L. Khare, Civil Judge, Lucknow, dated the 27th January, 1953.

The facts appear in the judgment

Akhtar Husain, for appellant.

The Junior Standing Counsel for Chief Inspector of Stamps.

The Judgment of the Court was delivered by—

MATHUR, J.:—This case has been referred to us for decision as brother V. D. BHARGAVA, J, did not agree with a single Judge decision and it was considered neces-

* Sitting at Lucknow.

1960

MOHAMMAD HABIBUR RAHMAN KHAN v. ABDUL QADIR FARUQI

Mathur, J

say that there should be a conclusive decision of the Court for the guidance of the subordinate courts.

Smt. Navab Begum had instituted Regular Suit No. 123 of 1950 for possession on the basis of a perpetual lease executed in her favour, on 12th May, 1947, by one Smt. Nanhi Begum. In the written statement filed by the defendants it was pleaded that Smt. Nanhi Begum had previously executed a deed of *waqf* followed by a gift deed, whereby she divested herself of all the interests she had in the property in suit. It was thus pleaded that Smt. Nanhi Begum had no right to execute a perpetual lease in favour of the plaintiff and on this ground the lease was invalid. The plaintiff then had her plaint amended by adding paragraph 4 (*a*) to the effect that both the deeds of gift and *waqf*, alleged to have been executed by Smt. Nanhi Begum, were void, invalid and inoperative and did not effect the plaintiff's right as acquired under the aforementioned lease. It was prayed, in the alternative, that even if the deed of *waqf* was valid, Smt. Nanhi Begum, being the Mutwalli, was entitled to execute the perpetual lease.

The plaintiff had paid court-fee for the relief of possession on the value of the house; but did not pay any court-fee for the adjudication of the deed of *wakf* and the gift deed to be void and inoperative.

The defendants took up the plea that the court fee paid was not sufficient, and the Chief Inspector of Stamps also made a similar objection on the ground that separate court-fee was payable for the cancellation of the deed of *wakf* and the gift deed, a question which was involved in the suit.

In view of the fact that the plaintiff had made an assertion in the alternative with regard to the deed of *wakf*, the trial court held that it was not necessary to declare the *wakfnama* to be void. It was further held

that if the gift deed was not declared invalid, Smt. Nanhi Begum would have possessed no interest which she could transfer to the plaintiff and on this ground the plaintiff's claim for possession would have to be rejected. The trial court therefore, directed the plaintiff to pay court-fee under clause (1) of section 7(iv-A) of the U. P. Court Fees Act also. The deficiency in court-fee came to Rs.2,893-12. The plaintiff made good the deficiency but at the same time preferred the present appeal under section 6-A of the Act.

Smt. Nayab Begum died during the pendency of the appeal and she is now represented by Mohammad Habibur Rahman Khan and Mohammad Fazlul Rahman Khan.

The appeal came up for hearing before the Single Judge who, in one way, accepted the finding of the trial court; but as there was certain conflict in the earlier decisions of this Court, he directed that the case be laid before a Bench.

Three points have been raised before us. Firstly, no cancellation of or adjudging void any instrument or document was involved in the suit; secondly, the deed of *wakf* or the gift deed could not be regarded to be an instrument securing property having market value; and thirdly, it was most inequitable that the plaintiff should pay double the court-fee when what she had prayed for was a simple relief of possession.

We may in the very beginning observe that these questions were considered by this Court at many occasions. We would make reference to only three Division Bench cases; the earliest is of *Smt Kamla Devi* v. *Sunni Central Board of wakfs, U. P., Lucknow* (1). The other cases are *Mt Jileba* v. *Mt. Parmesra* (2) and *Udai Pratap Gir* v. *Shanta Devi* (3). We are in

(1) A I R 1949 All. 63. (2) A I R 1949 All. 641.

(3) A I.R. 1956 All. 492.

1960

MOHAMMAD HABIBUR RAHMAN KHAN v. ABDUL QADIR FARUQI

Mathur, J.

respectful agreement with the views expressed in these cases, and for this reason, we shall merely briefly comment upon the provisions of the law.

The learned counsel for the appellants, however, invited our attention to certain cases in which a contrary view was taken. *Chief Inspector of Stamps* v. *Shri Gopalji Maharaj* (1) can easily be distinguished. There in the plaintiff had sued for possession claiming title to the property under a prior deed of *wakf* on the allegation that the subsequent sale deed executed in favour of the defendant was fictitious, bogus and invalid. The plaintiff's title in that case depended upon the validity of the prior deed of *wakf* and not upon the validity or invalidity of the subsequent sale deed. Even if the subsequent sale deed was a valid document and was not cancelled or adjudged void, the plaintiff would have succeeded or lost, depending upon the genuineness or invalidity of the deed of *wakf*. In that suit, therefore, the cancellation of the subsequent sale deed was not involved. *Chief Inspector of Stamps* v. *Jashpal Singh* (2) cannot be considered as a good law, not only on a proper appreciation of the provisions of the Court Fees Act but also because earlier Division Bench cases were not brought to the notice of the learned Judge. He appears to have been moved by the fact that the plaintiffs were not deriving any title through their father who had become insolvent and whose properties had been taken possession of and sold by the Receiver. If such were the facts, the case would have been covered by clause (2) and not by clause (1). At another place it was observed that the learned counsel for the State was not able to cite any authority to support the contention that the sale deed was a document securing property within the meaning of sub-section (iv-A) of section 7 of

(1) A I R 1950 All 231. (2) A.I.R. 1956 All 168

the Court Fees Act. It was thus mere by default than on merits that the above case was decided by a Single Judge of this Court

The other reported case relied upon by the appellants is *Chief Inspector of Stamps* v. *Deputy Commissioner Incharge, Court of Wards Shahpur Estate, Gonda* (1). The facts of this case are different, and for the purposes of the present case it is not necessary for us to express any final opinion as to whether this view is or is not in conflict with the latter decisions of the Court. Therein a sale deed executed by a Hindu widow was challenged by the reversioners on her death, and in the suit, the reversioners merely asked for a relief of possession The transfer made by the Hindu widow was considered to be a nullity after her death and it was consequently observed that it was not necessary for the reversioners to challenge the legality of the sale deed. In the present case the deed of *wakf* and the gift deed were executed by a Muslim lady and unless these documents were cancelled or adjudged void she could not grant a perpetual lease in favour of the plaintiff. In other words, the relief sought for could not be granted without setting aside the two documents.

Sub-Section (iv-A) of section 7 of the U P. Court Fees Act runs as below:

> "In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market-value, or an instrument securing money or other property having such value,"

The wordings are general and would make it clear that court-fee under this sub-section is payable not only in suits for cancellation of or adjudging void or voidable

(1) 1947 O. W. N. 281

1960

MOHAMMAD HABIBUR RAHMAN KHAN v. ABDUL QADIR FARUQI

Mathur, J.

a decree or an instrument, but also in suits involving cancellation or adjudging void or voidable such decree or document. The word 'involving' is of a very general nature and would cover those suits in which no relief had been sought for the cancellation or adjudging void or voidable a decree or document, but a relief cannot be granted till such cancellation or adjudication. Consequently, where the plaintiff does not pray for such an order, he shall have to pay court-fee under this sub-section, if it is necessary to cancel or to declare a decree or document to be void or voidable before he can be granted any relief. In the present case, the plaintiff could not succeed till the deed of wakf and gift deed were declared void and unenforceable. To put it differently, the cancellation of the documents was involved in the suit and court-fee was also payable under sub-section (iv-A).

The word 'secure' has a wider meaning. A transferee purchasing a property under a docoment secures the property as a result of the transfer and consequently the sale deed shall be an instrument securing valuable property as far as the transferee is concerned. Similarly, under the deed of *wakf* the owner divests himself of his proprietary rights and endows property for some charitable purpose, though in the case of *wakf-alal-aulad* a contingency may not arise for the utilization of the property for charitable purposes if there is one or the other beneficiary alive to claim the benefits under such *wakf*. However, in the eye of law, the owner divests himself of the proprietary rights in the property and such property thereafter belongs to the *wakf* to be managed by the Mutawalli. A property which is the subject-matter of gift becomes the property of the donee, and the donor ceases to have any interest in such property. A gift deed is, therefore, also an instrument securing property. In other words, the deed of *wakf*

and the gift deed the cancellation of which was involved in the present suit are instruments securing property having a market value In these circumstances, all the ingredients of sub-section (iv-A) were fulfilled and court-fee was payable either under clause (1) or clause (2) of the sub-section As these documents were executed by the predecessor-in-title of the plaintiff, the court-fee was rightly charged under clause (1)

It is true that the law is somewhat harsh to litigents who merely ask for a relief of possession but have to pay a extra court-fee on account of the cancellation of a decree or document being involved in the suit. It is only when the enactment is capable of more than one interpretation that the law shall have to be given that meaning which is more favourable to the subject, that is, to the plaintiff. But if the enactment has been worded in such words which are not at all ambiguous, the law must have its course and the court cannot give any benefit to litigants on the ground of equity, fairplay or good conscience.

A relief for possession, in substance, amounts to declaration with a consequential relief. In sub-section (iv) of section 7 it is provided that in any suit to obtain a declaratory decree or order where consequential relief other than the reliefs specified in sub-section (iv-A) is prayed, the court-fee shall be computed according to the amount at which the relief sought is valued in the plaint or the memorandum of appeal. Sub-section (iv) clearly excludes the reliefs specified in sub-section (iv-A), suggesting thereby that court-fee under sub-section (iv-A) is payable in addition to the court-fee payable for the declaratory decree with a consequential relief When double the court-fee is payable, one for declaratory decree with a consequential relief and the other for cancellation of or adjudging void or voidable a decree or document, the same principle can be applied where the

1960

MOHAMMAD HABIBUR RAHMAN KHAN v. ABDUL QADIR FARUQI

Mathur, J

main relief sought is for possession. We are, therefore, of opinion that on a consideration of the provisions of section 7 of the Court Fees Act, no other opinion can be formed except that the court-fee payable under sub-section (IV-A) is in addition to the court-fee payable under other provisions of the Act

The implied relief for cancellation of or adjudging void the deed of *wakf* and the gift deed cannot be said to be in the alternative, for the simple reason that unless both the reliefs are granted the plaintiff cannot succeed in the suit If the two documents are merely declared void and ineffective and no order is passed on the relief of possession, the decree to be passed would be infructuous and shall serve no practical purpose Further, the plaintiff's suit for possession cannot be decreed unless the two documents are adjudged void In other words, both the prayers for possession and declaration of documents to be void and ineffective, shall have to be adjudicated upon Sub-section (2) of section 17 of the Court Fees Act is, therefore, inapplicable and court-fee shall be payable on both the reliefs

In the aforementioned case of *Mt. Jileba* v. *Mt. Parmesia* (1) it was further held that the proper order to be passed in cases of the present kind was to direct the plaintiff to pay court-fee on the aggregate amount of the two reliefs, that is, double the valuation for the relief of possession, the valuation under the two sub-sections being the same, and not the aggregate of the court-fee to be computed separately. We may observe with respect that this view is in conflict with the express provisions of section 7 of the U. P. Court Fees Act. The section lays down the mode of computing the amount of fee payable under the Court Fees Act in suits detailed therein, and not the valuation on which *ad valorem* court-fee is payable. Therefore, the total court-fee pay-

(1) A.I.R 1936 All 492.

able shall be the aggregate of fee calculated under various sub-sections

To sum up, court-fee under section 7(iv-A) of the Court Fees Act is payable wherever the relief sought cannot be granted without cancellation of or adjudging void or voidable a decree or instrument securing property having market value, and such court-fee is payable over and above the court-fee payable for other reliefs of possession. Further, the total fee payable in the present case is the aggregate of the fee computed under the relevant sub-sections The court-fee was thus rightly assessed and recovered from the plaintiff

The appeal has no force and it is hereby dismissed with costs payable to the Standing Counsel

Appeal dismissed

CIVIL MISCELLANEOUS

Before Mr. Justice Tandon and Mr Justice Misra *

MUBARAK ALI KHAN . (APPLICANT)

v.

1960 Feb. 9

LAND MANAGEMENT COMMITTEE, AKOHARI AND ANOTHER (OPPOSITE-PARTIES)

Land *emerging from the bed of the river by diluvion whether comes within the definition of 'land' and vests in the Gaon Samaj—Removal of encroachment on land vested in Gaon Samaj—Cognizance of, without a resolution if the Gaon Samaj, whether valid—Sub-Divisional Officer, to* order *for compensation, whether competent, U P Zamindari Abolition and Land Reforms Act,* 1951, *s.* 117—*U. P. Zamindari Abolition and Land Reforms Rules,* 1952, *r.* 115, *sub rr C D. F and G*

Land emerging from the bed of a river by its diluvion action falls within the definition of 'land' and accordingly vests in the Gaon Samaj under s. 117 of the U. P Zamindari Abolition and Land Reforms Act.

Proceedings under r. 115-C of the U. P. Zamindari Abolition and Land Reforms Rules may be initiated even otherwise than on the resolution of the Land Management Committee and cannot, therefore, be assailed simply on the averment that there was no such resolution Moreover, the proceedings in this case having been started on a report of the Lekhpal who happens to be the Secretary of the Gaon Samaj who as such was competent to commence the proceedings under r. 115-G (ii)

The Sub-Divisional Officer is competent to award compensation in a proceeding for removal of the encroachments.

Civil Miscellaneous Writ No 25 of 1955

The facts appear in the judgment

Hamid Ali, for applicant

Junior Standing Counsel for opposite-party no. 1.

The Judgment of the Court was delivered by—

TANDON, J.:—These two petitions, the former by Mubarak Ali and the latter by Sheopal, are directed against two separate orders passed by the Sub-Divisional

Officer, Ramaneshighat in district Bara Banki in respect of two portions of survey plot no 1015 in village Akohari. Plot no 1015 is a bed of river but, as very often happens, whenever the river recedes and the land is made available for cultivation it is put to that use Mubarak Ali took possession of a portion of this plot bearing survey no. 1015/2 in 1362 Fasli, when by alluvial action the river had receded from it and it was available for cultivation. Similarly Sheopal took possession in the same year of another portion of the same plot bearing no 1015/5 On these persons taking possession of these sub-plots the Sub-Divisional Officer started proceedings under rule 115-C and subsequent connected rules framed under the U. P. Zamindari Abolition and Land Reforms Act, 1950 The two persons, on being called upon to show cause why they should not be evicted from those plots, appeared before the Sub-Divisional Officer and urged that the land had been in their occupation for several years past and they were not liable to be evicted In other words, they laid claim to these lands and denied the right of the Gaon Samaj to evict them under rule 115-C etc. The Sub-Divisional Officer rejected the plea of the two petitioners that they were in possession of these lands earlier He held that they were in the bed of river until 1361 Fasli but the two respondents before him (the petitioners here) had encroached upon the same. After necessary enquiry he, therefore, made an order evicting these persons from the lands respectively in their possession and also ordered, at the same time, Sheopal to pay Rs 40 as rent for two years and Mubarak Ali to pay Rs 54 as rent for the same period These persons who naturally were not satisfied with the order of the Sub-Divisional Officer thereafter commenced these petitions impugning the aforesaid orders of the Sub-Divisional Officer, dated the 22nd December, 1954

1960

MUBARAK ALI KHAN v. LAND MANAGEMENT COMMITTEE, AKOHRAI

Tandon, J

The prayer embodied in the two petitions is a writ in the nature of *certiorari* quashing the aforesaid orders and further to restrain the respondents from executing the same by realizing the amount ordered to be paid by the Sub-Divisional Officer or by evicting the petitioners.

Two grounds have been urged in their support, firstly, that the land in question was not land which had vested in the Gaon Samaj under section 117 of the Zamindari Abolition and Land Reforms Act, as such rule 115C and subsequent rules had no application to the present facts, and, secondly that the proceedings not having been started by any resolution or application the Land Management Committee were incompetent

Section 117 of the Zamindari Abolition and Land Reforms Act has in clause (i) laid down that all land whether cultivable or otherwise, except land for the time being comprised in any holding or grove, shall, as a result of the notification under that section, vest in the Gaon Samaj Whether the particular land or class of land in controversy in the two petitions has vested or not in the Goan Samaj by virtue of the notification under section 117 will thus depend on the criterion whether it is land which is not comprised in any holding or grove The clause has laid down that all land, except the lands of the above category, will vest in the Gaon Samaj. It does not make any distinction between land under cultivation and land not under cultivation. If, therefore, any land recovered from the bed of a river, which can be put to cultivation, is covered by expression "all land whether cultivable or otherwise" existing in clause (i) of section 117, we see no reason why the particular plots which are said to have been usurped or encroached upon by the two petitioners be not land which vested in the Goan Samaj under section 117 of the U. P. Zamindari Abolition and Land Reforms Act.

"Land" has been defined in the Zamindari Abolition and Land Reforms Act as land held or occupied for purposes connected with agriculture, etc These two sub-divisions of plot no 1015 are on the petitioners own showing land used for agricultural purposes. It is thus clear to our minds that these plots are included in lands which vested in the Goan Samaj under section 117

Rule 115C in sub-rule (2) has said that proceedings under its provisions can be commenced at the instance of the Chairman or any Member or Secretary of the Land Management Committee. According to the petitioners, the Land Management Committee made no representation to the Sub-Divisional Officer complaining against the encroachment On this ground alone they consider that the Sub-Divisional Officer had no jurisdiction to initiate proceedings under the rules. As already stated, proceedings under rule 115C can be commenced at the instance of the Chairman, any Member or Secretary of the Land Management Committee In the absence of any allegation that neither the Chairman, nor any Member nor any Secretary also moved the Sub-Divisional Officer to start proceedings under rule 115C, the mere allegation that the Land Management Committee as such did not move this officer will not render the proceedings necessarily void For all that we know from the counter-affidavit filed by the respondents, the Lekhpal of the circle who also happened to be the Secretary of the Land Management Committee had actually moved the Sub-Divisional Officer. In view of this fact, which we have no reason to doubt, proceedings held by the Sub-Divisional Officer were not without jurisdiction.

Now with regard to the second part of the order of the Sub-Divisional Officer by which he ordered compensation to be paid in both the cases equal to two years' rent, it will be necessary to refer to the rules in this connection

1960

MUBARAK ALI KHAN v. LAND MANAGEMENT COMMITTEE, AKOHRAI

Tandon, J

Rule 115D gives power to the Sub-Divisional Officer to make an enquiry but before doing so he is required to call upon the person concerned to refrain from causing damage or to repair the damage or remove the encroachment, etc He has to show cause against the requisition within 15 days The next rule gives power to the Sub-Divisional Officer to make such orders and to take such action as may be necessary for repair or prevention of damage to property or removal of encroachment therefrom, as he may consider necessary, after the opportunity has been given to the person proceeded against Rule 115F and rule 115G, which are directly in point, so far as this part of the order is concerned, are these.

> 115F (1) If the person against whom an order has been made fails to comply with it and the property is capable of being restored to its orginal condition, the Collector shall cause the damage to be repaired or the encroachment to be removed and he shall recover all expenses including the pay and travelling expenses of the staff deputed, if any, as arrears of land revenue
>
> (2) If the damage caused is of such a nature as is not capable of being repaired, as in the case of cutting of trees or grazing of plants or grass, the Collector shall assess the amount of damage in terms of money at the prevailing market rate in the lacality and shall recover the same from the person concerned as arrears of land revenue The amount so recovered shall be credited to the Gaon Fund.
>
> 115G. (1) If the person encroaching upon land has done cultivation therein, he may be allowed to retain the possession thereof until he has harvested the crop subject to payment by him of double the amount of one year's rent calculated at heredi-

tary rates for such land which shall be credited to the Gaon Fund. If the person concerned does not pay rent as aforesaid within a period of 15 days from the receipt of notice, possession of the land shall be restored to the Land Management Committee together with the crop

Provided that where such a person encroaches upon the same land or any other land within the jurisdiction of the Gaon Samaj for the second or subsequent time, he shall be ejected therefrom without being permitted to gather his produce, and possession of land together with the crop thereon shall be restored to the Land Management Committee"

An examination of the above provisions would point out that the Collector has power under certain circumstances to order payment of compensation by the person held responsible for making an encroachment or causing damage to any land vested in the Gaon Samaj. The case where compensation can be awarded is as provided in sub-rule (1) of Rule 115F that the person proceeded against has caused damage to the land which requires to be repaired In such cases the Collector can order him to repair the damage and if he fails to comply with his requisition, to cause the damage repaired by official agency and ask him to pay the expenses which, in the event of his not paying, can be recovered as arrears of land revenue Under sub-rule (2) the Sub-Divisional Officer has again power to require compensation to be paid the amount of which he can also assess, but here again the damage must be, as has been illustrated in the sub-rule, by way of cutting trees or grazing of plants or grass Neither sub-rule (1) nor sub-rule (2) thus confers any power on the Sub-Divisional Officer to require the person proceeded against to pay compensation by way of rent for the period he has remained in

1960

MUBARAK ALI KHAN v. LAND MANAGEMENT COMMITTEE, AKOHRAI

Tandon, J.

occupation of any land. The power to order compensation to be paid under this Rule is confined to cases where some damage has been done to the property or something growing over it has been removed or cut down.

The next rule, however, gives power to the Sub-Divitional Officer to order payment of double the amount of one year's rent where there is crop still existing on the land and the person is permitted to harvest and reap the crop We have looked into the original order of the Sub-Divisional Officer in the case of Mubarak Ali and we have found that the certified copy produced in the case has wrongly stated "five years" for "two years". The two petitioners had taken possession of the land in the year 1362 Fasli The order of the Sub-Divisional Officer ordering payment of compensation was passed during the same year. Although there is no clear direction in the two orders that the petitioners shall remain in possession of the crop until it is harvested, still the intention is clearly implied in the order requiring them to pay two years' rent for this year. Under these circumstances the order by which the Sub-Divisional Officer required compensation to be paid was fortified by the provisions of this rule.

As the petitioners have not succeeded on any of the grounds raised by them, both the petitions deserve to be rejected and we order accordingly. The petitioners will pay the respondents costs

Since the petitions have been dismissed, the stay orders are discharged.

Petitions dismissed.

CRIMINAL MISCELLANEOUS*

Before Mr. Justice Mulla and Mr. Justice Nigam

RAJ NARAIN (APPLICANT)

v.

STATE (OPPOSITE-PARTY)

1960
August, 16

Molesting a person *to prejudice of any act, employment or business—Penal liability for whether in transgression of the liberties guaranteed under the Constitution—Criminal Law Amendment Act*, 1932, *s.* 7—*Constitution of India*, 1950, *Art* 19.

Interpretation of Statutes—Presumption in favour of constitutionality of statutes—Rule of harmonius construction

The liberties guaranteed under Art. 19 of the Constitution are subject to the impositions of reasonable restrictions on the enjoyment of the same. Plain and simple loitering is not an offence It is only such loitering which involves or imposes coercion that is punishable under s 7 of the Criminal Law Amendment Act, 1932. The scope of the provisions of s. 7 being so determined it does not offend against the liberties guaranteed under Art. 19 of the Constitution and is, therefore, valid as a whole. Proceeding, however, on the assumption that the provisions of the impugned section cannot, in its entirety be so circumscribed, the first part of sub-s. (1) (*a*) is distinctly confined to acts or tendencies aforesaid and being severable from the rest is valid and operative as such and to that extent

Vimal Kishore Mehrotra v *State of Uttar Pradesh* (1) approved.

There is a presumption in favour of the constitutionality of a statute and this presumption would, in such circumstances, fail only where a harmonious interpretation of the diverse provisions involved in the working of the law is not possible.

Case law discussed

Criminal Miscellaneous Writ No. 164 of 1960

The facts appear in the judgment.

Tej Narain, for the applicant.

The Additional Government Advocate, for the State.

*Sitting at Lucknow

(1) A I R. 1956 All 56.

1960

RAJ NARAIN v. STATE

Mulla, J

MULLA, J :—This is a petition filed by Sri Raj Narain, who is a member of the Legislative Assembly of Uttar Pradesh, under Article 228 of the Constitution of India Sri Raj Narain is being prosecuted under section 117, Indian Penal Code and section 7 of the Criminal Law Amendment Act, 1932, in the court of a Judicial Magistrate at Lucknow The charge has already been framed in this case and subsequent to the framing of the charge an application on behalf of the petitioner was presented before the Magistrate under section 432(1), Criminal Procedure Code praying that the case be referred for decision to the High Court. The Magistrate by his order, dated the 17th of June, 1960, rejected the prayer as in his opinion sufficient grounds were not made out to make this reference The petitioner then came before the High Court under Article 228 of the Constitution of India. As the question raised in this petition was a substantial question of law as to the interpretation of the Constitution and the determination of which was necessary for the disposal of the case, it was withdrawn and the matter came before us.

The question of law raised in this case is that section 7 of the Criminal Law Amendment Act, 1932, is *ultra vires* of the Constitution and the proceedings pending against the petitioner were illegal Before deciding this question we may briefly mention the acts alleged against the petitioner which are the subject-matter of this prosecution.

The prosecution case is that the petitioner is one of the leaders of the Socialist Party and he distributed about a thousand printed pamphlets which bore his signatures inciting the members of his party to do certain acts. From the order of the Magistrate it

appears that these acts consisted of a large number of activities We may cite an extract from the order of the Magistrate which would give an idea of the acts for which an incitement was given in these pamphlets. The extract runs as follows

> " The allegations against the petitioners in this case are that they incited public and party members numbering more than 10 persons to come in thousands and to take possession over *parti* land, and to distribute same amongst landless persons, to surround Tahsils with thousands of cultivators who were cultivating land on loss and to continue this act of surrounding till their demands for remission of rent were conceded or they were arrested, to picket liquor shops in hundreds till the shop was closed, to picket peacefully courts, Sales Tax offices, etc also to colour wash English sign-boards, and to remove English writing at public places, to get grain distributed out of godowns at fair and cheap price, to picket Harijan Sahayak offices and District Magistrate's office for getting backward classes employed, and to picket in thousands with Harijan and backward classes and get work stopped, till they were given employment in suitable proportion and similarly to picket Canal, Tube-well and Forest Department offices with thousands of persons in protest against their high-handedness. "

We do not want to express any opinion at this stage whether the allegations contained in the above extract would be made out against the petitioner or not We have only to decide that the incitement for the commission of these acts is punishable under section 7 of the Criminal Law Amendment Act or not. We have further to decide that even if they are punishable

1960

RAJ NARAIN
v.
STATE

Mulla, J.

under the said Act, whether the said Act is *ultra vires* of the Constitution or not

Section 7 of the Criminal Law Amendment Act, 1932, runs as follows :

> 7. (1) Whoever—
>
> (*a*) with intent to cause any person to abstain from doing or to do any act which such person has a right to do or to abstain from doing, obstructs or uses violence to or intimidates such person or any member of his family or person in his employ, *or loiters at or near a place where such person or member or employed person resides or works or carries on business or happens to be, or persistently follows him from place to place, or* interferes with any property owned or used by him or deprives him or hinders him in the use thereof or
>
> (*a*) *loiters or does any similar act at or near the place where a person carries on business, in such a way and with intent that any person may thereby be deterred from entering or approaching or dealing at such place,* shall be punished with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.
>
> *Explanation*—Encouragement of indigenous industries or advocacy of temperance, without the commission of any of the acts prohibited by this section is not an offence under this section."

The counsel who appeared on behalf of the petitioner contended that the underlined portions in the section cited above are *ultra vires* of the Constitution

because they violate the fundamental rights guaranteed to every citizen of India under Article 19 of the Constitution of India. Our attention has been drawn to sub-clauses (*a*), (*b*) and (*d*) of this Article. We might as well give the relevant part of Article 19 which runs as follows :—

' 19 (1) All citizens shall have the right—

(*a*) to freedom of speech and expression ;

(*b*) to assemble peaceably and without arms ,

(*d*) to move freely throughout the territory of India. "

The contention is that the italicised portions of section 7 of the Criminal Law Amendment Act restricts these rights and, therefore, it transgresses the constitutional safeguards. We may as well quote clauses (2), (3) and (5) of Article 19 of the Constitution, for they are to be read along with the rights mentioned in (*a*), (*b*) and (*d*) :—

" (2) Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence,

(3) Nothing in sub-clause (*b*) of the said clause shall effect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause,

(5) Nothing in sub-clauses (*d*), (*e*) and (*f*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law, imposing reasonable

1960

RAJ NARAIN
v
STATE

Mulla, J

restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

A mere reading of these circumscribing clauses is sufficient to indicate that the theory of unfettered liberty and absolute rights is not envisaged by the Constitution In the World today such unfettered rights cannot be given to the citizens and restrictions have to be placed on these rights in the interests of the community as a whole The basic principle is that the welfare of the community holds priority over everything else and if there is a conflict between the welfare of the community and the right of an individual, it is the right of the individual which will have to give way to the welfare of the community. The doctrine of *laissez faire* advocated by Adam Smith has lost ground in the world today and now it is one of the accepted principles of a welfare State that the State can interfere in the affairs of individuals in the interests of the social and economic well-being of the entire community A plea of absolute and unfettered rights, therefore, cannot be entertained and the courts have only to see that the restrictions which are placed on the enjoyment of these rights by penal or other enactments come within the limit of the control mentioned in clauses (2), (3) and (5). It was observed by MUKHERJEE, J in *A K. Gopalan* v *The State of Madras* (1) :

> "There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. The possession and enjoyment of all rights, as was observed by the Supreme Court of America in *Jacobson* v. *Massachusetts* (2) are subject to such

(1) 1950 S C R. 88, 253 (2) (1904) 197 U S 643.

reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, general order and morals of the community "

We have, therefore, to see whether the prohibitions contained in section 7 of the Criminal Law Amendment Act are reasonable restrictions for the maintenance of public order or they transgress this limit

In approaching this question we would first mention that the Criminal Law Amendment Act was passed in the year 1932, many years before the Constitution of India came into existence. If there is any conflict between the provisions of this enactment and the Constitution, it must be held to be void to the extent these provisions are inconsistent with the rights safeguarded by the Constitution under Article 13(1) of the Constitution of India In order to understand the purpose of placing the Criminal Law Amendment Act on the Statute, we would cite an extract from the statement of Objects and Reasons given when the said Act was passed The extract runs as follows :

"The Civil Disobedience Movement has made it necessary to supplement the Criminal Law by means of certain Ordinances promulgated by the Governor-General in exercise of his powers under section 72 of the Government of India Act The Special Powers Ordinance, which combines powers taken by the earlier ordinances, expires on the 29th December, 1932 Though the Ordinances have enabled Local Governments and their officers to control the movement, its organisers have not yet abandoned their attempt to paralyse Government and to coerce law-abiding citizens "

It, therefore, appears that the Criminal Law Amendment Act, 1932, was a weapon placed in the hands of

1960

RAJ NARAIN
v.
STATE

Mulla, J.

the executive authorities to check the attempts to paralyse Government and to safeguard law-abiding citizens from being subjected to coercion. No doubt the Criminal Law Amendment Act was passed to meet a certain situation which was precipitated by our national struggle to achieve independence, but we have still to see the purpose for which this law was placed on the Statute. After the passing of the Constitution, every law, whether old or new, is on the anvil and if it contains certain provisions which are inconsistent with the rights guaranteed by the Constitution then they must be held to be void to the extent of this conflict

We now proceed to decide whether the provisions of section 7 of the Criminal Law Amendment Act are in such conflict with the rights conferred on the citizens of India under Article 19(*a*), (*b*) and (*d*) of the Constitution.

In the first place we would like to observe that the rights given to citizens are not given only to a few persons, but to all citizens of India. The basic essential factor in deciding whether a person has a right to do something or not is whether his doing so interfers or not with a similar right given to another citizen. The State cannot have favourites and it cannot hold that where there is a conflict between group A and group B and when group A wants to enforce its rights even though they may amount to a suppression of the rights of group B, they are protected by the words of Article 19. This interpretation would be absolutely unreasonable. The State has, therefore, to see that no citizen exercises his rights in such a manner that this exercise violates the rights of another citizen. The basic principle contained in these rights is contained in the maxim "Live and let live". No group or

individual can claim that he has a better right to do what he pleases irrespective of the fact that by so doing he is stopping the other from doing what he pleases We are, therefore, of the opinion that the rights conferred upon the citizen under Article 19 of the Constitution give him the liberty of doing something, but this doing something does not include the right of stopping another from doing what he wants to do. Article 19 does not grant the right to interfere with the liberty of another citizen Therefore, where the conduct ascribed amounts to an interference with the liberty of another, it is difficult to accept the plea that the offender is only exercising a right which was granted to him under the Constitution We, therefore, feel that on this basic ground alone the prohibitions contained in section 7 of the Criminal Law Amendment Act cannot be held to be *ultra vires* of the Constitution

So far as we are aware, there are only two Bench decisions in which the question which is before us has been considered. The first case was decided by a Bench of the Bombay High Court and it is *Damodar Ganesh* v. *State* (1) The learned Judges came to the conclusion that section 7 of the Criminal Law Amendment Act is *intra vires* of the Constitution. The second case was decided by a Bench of our own High Court and it is *Vimal Kishore Mehrotra* v *State of Uttar Pradesh* (2) In this case the learned Judges came to the conclusion that certain portions of section 7 of the Criminal Law Amendment Act are definitely *ultra vires* of the Constitution, though it may be questionable whether some others are also *intra vires* or not In the case before them, they found that the conduct ascribed to the accused was covered by those

(1) A I R 1951 Bom 459 (2) A I R 1956 All 56

1960

RAJ NARAIN
v
STATE

Mulla, J

parts which were *intra vires* of the Constitution and so they did not definitely decide whether the other parts were *intra vires* or not. They also held that these parts which were not held to be *intra vires,* even if they were *ultra vires* could be severed and section 7 of the Criminal Law Amendment Act would not be *ultra vires* as a whole. The learned Judges who heard the Allahabad case made no reference to the Bombay decision cited above and, therefore, it appears that it was not placed before them We have carefully perrused these two decisions and we find ourselves in agreement with the view expressed by the Bombay High Court. In our opinion the whole of section 7 of the Criminal Law Amendment Act, 1932, is *intra vires* of the Constitution. We now proceed to give our reasons for coming to this conclusion.

The main contention advanced before us is that parts of section 7 of the Criminal Law Amendment Act prohibit innocuous acts such as peaceful picketing and this violates the basic right guaranteed to a citizen. The argument needs a careful examination. There are two decisions of the United States Supreme Court which to a certain extent support this contention. These decisions are *Byron Thornhill* v *State of Alabama* (1) and another case which immediately follows this case, *John Carlson* v. *People of the State of California* (2). These two decisions were pronounced by the same Judge on the same date. In these decisions it was held that peaceful picketing cannot be stopped, because it infringes the basic rights given to the citizens. On the analogy of these decisions it was contended that clause (*b*) of section 7 of the Criminal Law Amendment Act and the middle part of caluse (*a*) are *ultra vires* of the Constitution, because under these provisions peaceful picketing is also forbidden

(1) 84 L Ed 1093 (2) 84 L Ed 1104.

1960

RAJ NARAIN
v.
STATE

Mulla, J

These two decisions were considered by the learned Judges of the Bombay High Court, but they did not agree with the view expressed in these decisions We also find it difficult to accept the view taken in these two American cases. It is so difficult to apply the rule of law laid down in one country to another country, for conditions of life vary materially and what may not create chaos in one country may do so in the other country Even in *Thornhill's* case (1) the learned Judge observed :—

> "The State urges that the purpose of the challenged statute is the protection of the community from the violence and breaches of the peace, which it asserts, are the concomitants of picketing The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labour dispute involving the latter. We are not now concerned with picketing *on mesne* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger."

A reading of the extract shows that where picketing is to be done *en masee* or conducted otherwise which may occasion a danger to the liberty and property of others then in those cases it would be lawful to declare that picketing illegal, and it can no longer be called peaceful picketing At another place in the same

(1) 84 L Ed., 1093

1960

RAJ NARAIN
v.
STATE

Mulla, J.

judgment the learned Judge observed at pages 1100 to 1101 .

> "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the prescribed activity, the peaceful character of their demeanour the nature of their dispute with an employer or the restrained character and the accurateness of the terminology used in notifying the public of the facts of the dispute "

This extract again shows that it was the sweeping character of the prohibition in that provision of law which was being considered in that case that was responsible for declaring it void We do not want to express any opinion on the allegations made against the applicant, lest they might prejudice the applicant, but we cannot help observing that the directions contained in the pamphlet which is the subject-matter of the charge against him, if successfully carried out, would paralyse the administration and create an internal revolution and revolutions are seldom peaceful. The learned Judges of the Bombay High Court also dealt with this aspect of the case and they observed at page 465 :—

> "Thirdly, it has to be remembered that peaceful picketing by its nature should, in all probability, not result in any violence But we have seen frequent instances where peaceful picketing may degenerate or has degenerated into violence. It may be that having regard to the development of the society in which we live, the standard of education among the masses and sense of civic duty among the persons on whom these restrictions are sought to be imposed, the Legislature may well have thought fit to enact restrictions in the terms of section 7 of the Criminal Law Amend-

ment Act. In all such cases, the presumption should be in favour of the reasonableness of the restriction, although the final decision as to whether it is reasonable or not must, under the Constitution, remain with the Court."

If we may say so with respect, we are in entire agreement with the observations made above In our opinion the analogies of American law cannot be applied to the conditions that exist in this country. Perhaps in the United States picketing has not yet been forged as a weapon to disrupt the administration and paralyse the functioning of the State departments nor has it ever been resorted to *en masse* on a large scale We also feel that unless a Court is in a position to determine that the restrictions imposed are definitely unreasonable it is not possible to come to the conclusion that such a law is *ultra vires* of the Constitution

The Supreme Court in several cases has given a guidance as to how the question should be approached when the constitutionality of an enactment is challenged We will cite only one extract from *Hamdard Dawakhana* v *The Union of India* (1) :

"Therefore when the constitutionality of an enactment is challenged on the ground of violation of any of the articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e, its subject-matter, the area in which it is intended to operate, its purport and intent have to be determined In order to do so it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease

(1) A I R 1960 S C 554, 559, 560.

1960

RAJ NARAIN
v.
STATE

Mulla, J

which the legislature resolved to cure and the true reason for the remedy ; *Bengal Immunity Co. Ltd.* v *State of Bihar* (1), *R M D Chamarbaughwala* v. *Union of India* (2), *Mahant Moti Das* v. *S P. Sahi* (3).

Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted Presumption is, therefore, in favour of the constitutionality of an enactment. *Charanjit Lal* v. *Union of India* (4), *State of Bombay* v. *F. N Bulsara* (5)."

The first duty of the Court is to make an attempt to harmonize the impugned law with the Constitution and if any harmony can be reached, it should be done. It is only where a harmony cannot be reached that a law has to be declared void. There is a presumption in favour of the constitutionality of an enactment and this presumption fails only where the conflict cannot be resolved. Applying this test we find that a harmonious interpretation is possible. We have mentioned above the intention and purpose behind the enactment of the Criminal Law Amendment Act. It was to stop the Government from being paralysed and to protect persons from being coerced If all the provisions of section 7 of the Criminal Law Amendment Act are interpreted in the background of this purpose, we find no disharmony between the Constitution and

(1) (1952) 2 S C R 603, 632, 633. (2) (1957) S C R 930, 936
(3) A I R 1959 S C 942, 948 (4) 1950 S C.R. 869.
(5) 1951 S C.R. 682.

the Criminal Law Amendment Act. In interpreting the words of a Statute that interpretation which brings about harmony should be preferred. That the State should prohibit the citizens from creating chaos and anarchy and to that extent limit their liberty must be held to be a reasonable restriction in the interests of the community. Even the alleged peaceful picketing can be a danger to public order when it is resorted to *'en masse'* as was conceded even in the American decisions cited above, for 'picketing *en masse*' cannot be peaceful and it is clearly a coercion exercised by a group upon another group in order to force its will Only that picketing which is done by a few and which does not go beyond the length of persuation and inducement and which does not restrain the others from doing what they please can be excepted Looking closely to the words of section 7 of the Criminal Law Amendment Act, we would take out the impugned portions and see whether they prohibit any peaceful pursuits Section 7 of the Criminal Law Amendment Act runs as follows :—

> " (1) (*a*) Whoever with intent to cause any person to abstain from doing or to do any act which such person has a right to do or to abstain from doing . loiters at or near a place where such person or member or employed person resides or works or carries on business or happens to be, or persistently follows him from place to place . .
>
> (*b*) loiters or does any similar act at or near the place where a person carries on business, in such a way and with intent that any person may thereby be deterred from entering or approaching or dealing at such place . . . "

The contention is that according to the terminology used in this section, a peaceful picketer would be held to be guilty for all that he has to do to bring him in the clutches of the law is to loiter near the place where

1960

RAJ NARAIN v. STATE

Mulla J

such person or member or employed person resides or works. The contention is not sound because this loitering becomes an offence only when it is done with intent to cause any person to abstain from doing or to do any act which such person has a right to do or to abstain from doing In other words it is only in those circumstances where the act of loitering amounts to a clear coercion that section 7 of the Criminal Law Amendment Act would be applicable Coercion by itself implies a restraint by use of force or show of force or by creating an apprehension in the mind of the victim that force would be used against him. It is not merely the act of loitering which has been made punishable, but such loitering from which on the facts proved it can be inferred that this loitering was for the purpose of exercising coercion We, therefore, feel that the word 'loitering' should be interpreted not merely as an act of hanging round, but where there is an element of menace in this hanging round and only this aspect of loitering has been made an offence. Similarly in clause (*b*) of section 7 the word 'deterred' has been used which again qualifies the type of loitering which has been made punishable. In the Bombay decision the learned Judges observed at page 462 :

> " The use of the word 'deter' suggests engendering some kind of feeling of fear or fright in the person who wishes to enter or approach or deal at the place, and it is, therefore, possible to argue that peaceful picketing would not strictly be covered by clause (*b*) of section 7(1). Even peaceful picketing, as generally understood, may engender a feeling of fear or fright and thus deter a person from entering or approaching any place of business, if it is carried on in a particular way or by persons of particular status, type, persuation or antecedents. "

It would, therefore, be seen that plain and simple loitering has not been made punishable and it is only that loitering which amounts to coercion which has been made an offence. We think the words of clauses (*a*) and (*b*) of section 7 of the Criminal Law Amendment Act are capable of this interpretation and as this interpretation is not only consistent with the object of the enactment but it also harmonizes section 7 of the Criminal Law Amendment Act with the Constitution, this interpretation should be preferred. Interpreted this way, section 7 ceases to be an encroachment on any rights but really becomes a safeguard for the protection of those very rights.

Even in the American cases the impugned law was held to be void because mere persuasion and inducement could also be made punishable under that provision. The interpretation which we have put upon the word 'loitering' will not make it possible for the provisions of this section to be utilized against strictly peaceful picketers. Where only one or two persons do peaceful picketing without using any threats or without putting any physical obstruction or restraint upon any person, they would not come under the definition of loitering. It would be a matter of evidence in the case whether the picketing advocated by the applicant was legal or illegal, peaceful or coercive, and we do not want to express any opinion on that point.

The counsel for the applicant placed before us a decision of the Supreme Court in *The Superintendent, Central Prison, Fatehgarh* v. *Dr. Ram Manohar Lohia* (1) The view expressed in this case does not help the applicant because there is a great deal of difference between the terminology of section 3 of the U. P. Special Powers Act, 1932 and the words of section 7

(1) A I R 1960 S C 633

1960

RAJ NARAIN
v.
STATE

Mulla J

of the Criminal Law Amendment Act In the first Act the words were too general and sweeping and as observed by the learned Judges even innocuous speeches were prohibited by threat of punishment. Section 7 of the Criminal Law Amendment Act does not threaten any innocent persons and even if it is held that it does the offending part can be severed

In view of what we have observed above, we are of the opinion that section 7 of the Criminal Law Amendment Act is *intra vires* of the Constitution of India We are also of the opinion that if it is found that the two sub-clauses that dealt with loitering are *ultra vires* of the Constitution, they are severable and they can be separated Of course if the words of section 7 had been such that a severance was not possible, another view might have been taken, but we agree with the view expressed by the learned Judges in *Vimal Kishore Mehrotra's* case (1) that these words are severable In the first place we think that the entire section 7 of the Criminal Law Amendment Act is *intra vires,* but in case the other view is preferred, the first part of clause (*a*) of section 7 is definitely *intra vires* When the Magistrate rejected the prayer made by the applicant before him, he came to the conclusion that section 7 of the Criminal Law Amendment Act so far as it relates to the allegations in this case was not void Even the counsel for the applicant conceded that the prohibition contained in this first part of clause (*a*) and the last part of the same clause are not in conflict with the rights given under Article 19 of the Constitution.

We have deliberately avoided referring to the merits of the case and we have refrained from expressing any opinion as to which part of section 7 will cover the conduct of the applicant if the allegations made against him are proved We leave it to the trial court.

(1) A I R 1956 All 56

In view of the conclusions to which we have reached, we send this case back to the Magistrate for disposal A copy of this judgment shall be sent to the Magistrate along with the file of the case with the direction that he should now proceed with the case in conformity with our decision

Petition decided accordingly and case sent back for trial

Order accordingly

APPELLATE CIVIL

Before the Honourable O. H Mootham, Chief Justice and Mr. Justice Dhavan

1960
August, 24

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR AND ANOTHER (APPELLANTS)

v

KASHI PRASAD GUPTA AND OTHERS (RESPONDENTS)

Nationalization of a transport service—*Cancellation of an existing permit on the notified route—Permit to the displaced operator on another route for which* X, *among others, had a permit—Validity of the permit to the displaced operator—* X, *whether aggrieved and entitled to constitutional remedy—Motor Vehicles Act,* 1939, *Chs IV, IVA, ss* 43, 47, 48, 68 (*c*) (*F*), (*G*)—*U P State Road Transport Service (Development) Rules,* 1958, *rr.* 4 (1) *and* 10—*Constitution of India,* 1950, *Art* 226

A, B and *C* whose permits for running a stage carriage on a certain route were, on account of the service being undertaken by the State Government, cancelled were, in the alternative or by way of compensatory relief, given permits on another route for which X among others, had a permit In a petition by X for writ of *certiorari* for quashing the resolution of the Regional Transport Authority (R T. A) which issued the permit in question and for a *mandamus* commanding the R T A to forbear from permitting *A, B* and *C* to operate on the alternative route,

Held, (i) that the resolution in question being an administrative order, though liable to be quashed otherwise, was not amenable to *certiorari,* Moreover the resolution was a completed transaction and the mere quashing of the same will not in any way ensure for the benefit of the petitioner

(ii) That it is well settled that *mandamus* issues only where there is a legal right and no specific or adequate alternative relief for enforcing that right As ruled by the Full Bench in the *Indian Sugar Mills Association* v *The Secretary to Government, Uttar Pradesh* (1), this Court should exercise its powers under Art 226 of the Constitution in those clear cases where, *inter alia,* the rights of a person have been seriously infringed. The presumptive loss of earning by the mere increase in the number of bus operators on the same route is not such an injury

(1) 1950 A L. J 767

(*Per* DHAVAN, J.)—The jurisdiction of the High Courts under Art 226 of the Constitution is neither identical nor co-extensive with that of English courts.

The petitioner cannot under these circumstances, be said to be the aggrieved person for the purposes of the constitutional remedy on merits, held (*obiter*),

(iii) that notwithstanding the absence of such a provision in the scheme of nationalisation as settled and published under the Motor Vehicles Act, the Regional Transport Authority has, under s. 68 G (2) the power to issue a permit in lieu of compensation to a displaced operator whose existing permit has been cancelled under s 68-F;

(iv) that in issuing the alternative permit the Transport Authorities need not follow the elaborate procedure prescribed under Chapter IV of the Act The requisite procedure is cotained in s 68-G(2) The difference in procedure cannot be attacked as being discriminatory for the two are meant for two different categories of operators—those praying for fresh permits and those deprived of their permits, the initiative and prayer in the former being on behalf of the applicants while the initiative and offer in the latter being on behalf of the Transport Authority—and are reasonably related to their circumstances;

(v) that the notification, under s. 68-F(2) cancelling an existing permit even where it is issued by the Regional Transport Officer cannot be challenged in a writ petition firstly because it is a ministerial act and secondly because the power in question could and has been validly delegated under s. 44 (5) read with r 10 of the U. P State Road Transport Service (Development) Rules, 1955

Case-law discussed.

Special Appeal No. 8 of 1960 from a decision of TANDON, J., dated 1st January, 1960, passed in Civil Miscellaneous Writ No 2470 of 1959.

The facts appear in the judgment

K. B Asthana, for the appellants

S. N. Kacker, for the respondents

MOOTHAM, C. J.:—These are two appeals from an order of a learned Judge, dated the 1st January, 1960 Sri Ram Audh Misra, the first appellant in Appeal No. 11, held a permit permitting him to ply a stage carriage on the Deoria—Lar route, and Sri Mohammad Ismail

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C J.

and Sri Mahabir Prasad, the second and third appellants in that appeal, were holders of permits permitting them to ply on the Siswabazar—Thuthibari route Schemes under Chapter IVA of the Motor Vehicles Act were prepared Whereunder these two routes were to be operated exclusively by a State transport undertaking; and in due course the schemes were approved and the two routes became notified routes. The schemes involved the displacement of the three appellants, and provision was made in the schemes for the payment to them of compensation therefor. Although the schemes made no provision for the appellants being offered alternative routes, the Regional Transport Authority, Gorakhpur, offered permits to the three appellants permitting them to ply on the Gorakhpur—Khajni—Gola route This offer was accepted, and an endorsement was made on the permits of the three appellants, which had been cancelled with effect from the 21st June, 1959, that these appellants were permitted to ply on the Gorakhpur—Gola route for the unexpired periods of the cancelled permits The making of the offer and its acceptance by the appellants was recorded in a resolution no 32, of the Regional Transport Authority, Gorakhpur, passed at a meeting held on the 26th September, 1959.

Gorakhpur is connected with Gola by two routes Both routes pass through Khajni and then one proceeds *via* Urva and the other *via* Urva Malkanpur The number of stage carriages permitted to ply on the former route is ten and on the latter two, and as the two routes largely overlap the Regional Transport Authority permits the holder of a permit for one route to ply on the other route It is common ground that for all practical purposes the two routes can be treated as one, the number of stage carriages permitted to ply thereon being twelve.

Sri Kashi Prasad Gupta, the principal respondent in both appeals (to whom it is convenient to refer as 'the respondent') is the holder of a permit permitting him to ply his stage carriage on the Gorakhpur—Gola *via* Khajni and Urva route He filed a petition in this Court under Art 226 of the Constitution challenging the validity of resolution no 32 of the Regional Transport Authority passed at its meeting on the 26th September, 1959, and prayed that it be quashed by writ of *certiorari*. He further prayed for the issue of a writ in the nature of *mandamus* commanding the Regional Transport Authority to forbear from permitting the three appellants to ply on the Gorakhpur—Gola route The learned Judge was of opinion that as the scheme provided for the cancellation of the appellants' licences for their old routes on payment of compensation, the Regional Transport Authority had no power to offer them an alternative route and the grant of permits to the appellants to ply on the Gorakhpur—Gola route was without jurisdiction He accordingly allowed the petition, quashed the impugned resolution and directed the appellants in appeal no. 11 not to operate on the Gorakhpur—Gola route. It is from that order that these appeals have been filed, the appellants, in Appeal no 8 being the Regional Transport Authority, Gorakhpur, and its Secretary

The case for the appellants in the two appeals is substantially the same The main contentions are two first, that the respondent is not an 'aggrieved person' and is not therefore entitled to obtain relief on the petition under Art 226 of the Constitution ; and, secondly, that the Regional Transport Authority had ample power to grant these displaced operators permits to ply their buses on an alternative route. Sri S N. Kacker for the respondent seeks also to support the order of the learned Judge on the additional grounds—(*a*) that the noti-

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C J.

fications issued under section 68-C and 68-F (11) were invalid and (b) that the Regional Transport Authority had no power to grant permits to the three displaced operators to ply their vehicles on the Gorakhpur—Gola route in contravention of the provisions of sections 47 (3) and 48 of the Motor Vehicles Act.

For the purpose of determining whether the respondent is an 'aggrieved person' and as such entitled to approach this Court for relief under Art. 226 it is necessary to look first at the reliefs which he seeks to obtain. Those reliefs are two. The first is for the issue of a writ in the nature of *certiorari* 'or like writ or direction' to quash Resolution no. 32 passed by the Regional Transport Authority at its meeting held on the 26th September, 1959; the second is for a writ in the nature of *mandamus* commanding the Regional Transport Authority and its Secretary to forbear from placing the appellants in Appeal no. 11 on the "Gorakhpur—Gola *via* Khajni and Urva route otherwise than in accorddance with law". Now the impugned Resolution no. 32 reads thus

> "32. (1) Ram Awadh Misra, resident of Barhaj, district Deoria displaced from Deoria—Lar
>
> (4) Mohd. Ismail—Gorakhpur displaced from Siswa—Thuthi-Bari.
>
> (iii) Mahabir Prasad Gorakhpur—
>
> Regional Transport Authority has offered these three displaced operators as an alternative route Gorakhpur—Gola *via* Khajani in lieu of compensation under section 68-G(2) of Chapter IV-A of Motor Vehicles Act of 1939 read with section 68-B of Chapter IV-A The above route has been accepted by these operators."

The recording of this resolution was a purely administrative act, and although the resolution might be quashed by a direction or order it cannot be done by *certiorari* I am however unable to appreciate how the quashing of this resolution can operate to the advantage of the respondent The resolution is merely the record of an already completed transaction, and the quashing of the record will not, *per se* affect the transaction The Court does not make orders which are not effective and I do not think that the respondent was entitled to the first of the reliefs for which he asked

The second relief sought is the issue of a writ in the nature of *mandamus*. Now it is I think well settled that *mandumus* issues only where there is a legal right and no specific remedy—or no adequate alternative remedy—for enforcing that right. "Where there is no specific remedy and by reason of the want of that specific remedy justice cannot be done unless a *mandamus* is to go, then a *mandamus* will go": *per Brett,* M. R, in *The Queen* v *The Commissioner of Inland Revenue In re Nathan* (1) The question whether the respondent is possessed of any right at all in the present case is disputed The appellants contend that he is objecting to competition and that his right to ply his bus gives him no right to raise such an objection. To this the reply is that the respondent does not, and cannot, object to fair competition ; but that he is entitled to object to competition arising out of the grant to rival bus operators of permits not lawfully issued For the reason which I shall state shortly I do not think it is necessary in this case to define the nature of the right which a petitioner must possess before he can ask for the issue of the writ of *mandamus;* but I should be sorry to think the law is such that a person in the position of

(1) L R [1884] 12 Q B 461, 473

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C. J.

the respondent, provided he can show something more than nominal loss, is without a remedy. As the Supreme Court has pointed out in *Saghir Ahmad* v *The State of Uttar Pradesh* (1) any member of the public can, within the limits imposed by State regulations, carry on the business of transporting passengers by motor vehicle. His right to carry on that business is guaranteed under Art 19(1)(*g*), and he is entitled to challenge the constitutionality of any law which unreasonably curtails that right I am disposed to hold that he can also challenge the legality of action purporting to be taken under a law if such action unjustifiably curtails that right.

I think it however unnecessary to pursue this matter further for a Full Bench of this Court has, in *The Indian Sugar Mills Association* v. *The Secretary to Government, Uttar Pradesh* (2) laid it down that the Court should exercise its powers under Art. 226 only in those clear cases where, *inter alia,* the rights of a person have been seriously infringed That decision is binding on us, and in my opinion the respondent has failed to satisfy that requirement. In his affidavit in support of his petition the respondent merely states that the Gorakhpur-Gola route is uneconomic and that if the appellants in Appeal No 11 are allowed also to ply on it the making of a respectable margin of profit would be impossible. The correctness of this assertion is denied by all the appellants in the counter-affidavits filed on their behalf, but notwithstanding this denial the respondent in his rejoinder affidavit is content to rely on his original statement No figures in support of that statement have been given Mr *Kacker* has argued that, *prima facie,* an increase in the number of buses will necessarily result in a fall in the respondent's earnings; and that even if it be the case (as contended by the State) that there has been an increase in the number of the travel-

(1) A I R 1954 S.C 728 (2) 1950 A L J 767

ling public then, again *prima facie,* the respondent will obtain a smaller share in the increased business than he would have done had the appellants' buses not been on the road. This argument is not without force, but in the absence of figures, which in view of the attitude of the appellants the respondent ought to have produced, I am unable to hold that he has suffered or is likely to suffer serious loss and therefore that his rights (which for this purpose I assume him to possess) have been seriously infringed. This conclusion is enough to dispose of this appeal, but as the questions of law which arise in the appeal have been fully argued and are of considerable importance, I think it proper to express my opinion on them

In considering the question of the validity of the acts done by the authorities it is convenient to state shortly the provisions of the Motor Vehicles Act regulating the establishment of a road transport service by a State Government. The principal provisions are to be found in ss 68-A to 68-I which form Chapter IV-A of the Act and which, by virtue of section 68-B, shall have effect notwithstanding anything inconsistent therewith contained in Chapter IV of the Act or in other law for the time being in force. The first step is for the State transport undertaking, which is defined as meaning an undertaking providing a road transport service carried on *inter alia* by a State Government, to prepare a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and such other particulars as may be prescribed, and to cause such scheme to be published in the official *Gazette.* Section 68-D then provides that any person affected by the scheme may within 30 days from the publication thereof file objections before the State Government. The State Government will then, after giving an opportunity to the objector and the representatives of the

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C J.

State transport undertaking to be heard, either approve or modify the scheme The scheme as approved or modified must then be published in the official *Gazette*. Upon publication the scheme becomes final and is known as an 'approved scheme' and the area or route to which it relates is called a 'notified area' or 'notified route'. The State transport undertaking must then under section 68-F (1) apply in the manner specified in Chapter IV for the appropriate permit in respect of the notified area or route, and the Regional Transport Authority must thereupon issue such permit. Sub-section (2) of this section further provides that for the purpose of giving effect to the approved scheme the Regional Transport Authority may by order refuse to entertain any application for the renewal of a permit or cancel or modify the terms of an existing permit.

Section 68-G states the principles and method of determining compensation. Sub-section (1) provides that where an existing permit is cancelled or the terms are modified in exercise of the powers conferred on the Regional Transport Authority by section 68-F, then the State transport undertaking shall pay to the holder of the permit compensation the amount of which shall be determined in accordance with the provisions of sub-sections (4) and (5). The meaning and effect of sub-section (2) has been the subject of much controversy. It provides that—

> "Notwithstanding anything contained in sub-section (1) no compensation shall be payable on account of the cancellation of any existing permit or any modification of the terms thereof, when a permit for an alternative route or area in lieu thereof has been offered by the Regional Transport Authority and accepted by the holder of the permit."

Section 68-H then provides that compensation under the preceding section shall be paid within one month from

the date on which the cancellation or modification of the permit becomes effective The last section of this chapter, section 68-I, empowers the State Government to make rules for the purpose of carrying into effect the provisions of this chapter. Rules have been made by the State Government under this section, but before making any reference to them it is convenient to refer to section 43 of the Act This section provides that a State Government, after having regard to the considerations referred to in sub-section (1), may by notification in the official *Gazette* issue directions to the State Transport Authority with regard to certain matters including—

> "(iii) regarding the grant of permits for alternative routes or areas, to persons in whose cases the existing permits are cancelled or the terms thereof are modified in exercise of the powers conferred by clause (*b*) or clause (*c*) of sub-section (2) of section 68-F."

To this power there is however attached a proviso, namely that no such notification should be issued unless a draft of the proposed directions is published in the official *Gazette* specifying therein a date being not less than one month after such publication, on or after which the draft will be taken into consideration and any objection or suggestion which may be received has, in consultation with the State Transport Authority, been considered after giving "the representatives of the interests effected" an opportunity of being heard.

Rules have been made by the State Government under sections 68-I and 68 (which latter section empowers the State Government to make rules for the purpose of carrying into effect the provisions of Chapter IV) known as the U. P. State Road Transport Service (Development) Rules, 1958. Rule 3 lays down that every scheme framed in pursuance of section 68-C shall provide for "all or any" of the several matters thereinafter enumerated

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C. J.

and rule 4 provides that a scheme framed under section 68C of the Act shall be published in Form I appended to the Rules, and that form includes a clause which reads thus:

> "(9) The route covered by permit Nos. ..... shall be curtailed so as to exclude ... .Permit No /Nos... . .shall be transferred to route /s. .... the holder of permit No./Nos. .. . .shall get compensation for premature cancellation of, or curtailment of any route or area covered by the aforesaid permit/s."

It is convenient now to look a little more closely at the schemes by which the Deoria-Lar and Siswabazar—Thuthibari routes became approved routes. The schemes as finally approved were published in the *Uttar Pradesh Gazette* on the 16th May, 1959. As the provisions of the two schemes are in all material respects the same it is sufficient to refer to the scheme regarding the Siswabazar-Thuthibari route. Omitting the immaterial provisions the scheme was in these terms:

> "*Scheme regarding Siswabazar-Nichlaul-Thuthribari route of Gorakhpur Region.*
>
> 1 The State Road Transport Services shall "commence to operate from June 1, 1959, or thereafter"
>
> 2. State Road Transport Service shall be provided on the route Siswabazar-Nichlaul-Thuthibari of Gorakhpur Region
>
> 3 ... .
>
> 4. No persons other than the State Transport undertaking will be permitted to provide any Road Transport Services on the route or portion thereof specified in clause (2) above
>
> 5 . ...
>
> 6. The transport vehicles which may be used on the route indicated in clause (2) above, shall be

of country type and their carrying capacity shall be 30 to 40 seats.

7 The permit nos. (1)9/SC and (2)24/SC which have been granted to Sarvsri (1) Mohammad Ismail and (2) Mahabir Prasad for Siswabazar-Nichlaul-Thuthibari route by the Regional Transport Authority, Gorakhpur, under Chapter IV of the Motor Vehicles Act, 1939, shall be cancelled

8. The number of transport vehicles plying on the route or portion thereof specified in clause (2) above shall be reduced to nil

9. The permit nos (1) 9/SC and (2) 24/SC shall be cancelled and the holders of these permits Sarvsri (1) Mohammad Ismail and (2) Mahabir Prasad shall get compensation for the premature cancellation of the aforesaid permits."

It is contended by the appellants that the learned Judge was wrong in holding that as neither of the schemes made provision for the offer of alternative routes to the displaced operators the Regional Transport authority had no jurisdiction to give them new permits permitting them to ply their buses on the Gorakhpur-Gola route. For the respondents it is argued that even if it be unnecessary for such provision to be made in the schemes the Regional Transport Authority could not issue permits to the displaced operators without following the procedure laid down in section 47 and that therefore in any event it acted in excess of its powers in granting the permits in the present case.

Section 68-C of the Act provides that a scheme proposed by a State transport undertaking shall give—

"particulars of the nature of the service proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed."

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C J

With this must be read rule 3 of the U. P. State Road Transport Services (Development) Rules 1958, which lays down that every scheme shall provide for—

> "all or any of the matters therein enumerated as clauses (*a*) to (*m*)"

The only clause relevant for our present purpose is (*j*) which reads thus:

> "(*j*) The curtailment of the route or portion thereof covered by the existing permits or transfer of the permits to any other route or routes and giving of compensation, if any."

It is not easy to understand what exactly is meant by the words "transfer of the permits to any other route". It is argued by the respondents that notwithstanding the use of the word "transfer" these words really refer to the offer by the Regional Transport Authority of an alternative route for which provision is made in section 68G (2) I do not think that this is so

It is useful in this connection to look at the provisions of the U P. Road Transport Services (Development) Act, 1955 That Act also made provisions for the establishment of State Road Transport Services. As under section 68C of the Motor Vehicles Act a scheme had to be prepared, and in section 4(2) are enumerated the matters for which provision could be made under the scheme, and of these clause (i) was—

> "(i) The curtailment of the route covered by the existing permits or transfer of the permits to any other route or routes."

Specific provision is made in that Act for the transfer of existing permits of displaced operators to other routes: [Section 4(2) and 5]. An essential difference between the two Acts is that the U. P. Act envisages the transfer of an existing permit to another route whereas the Motor Vehicles Act provides for the offer of a fresh

permit after the cancellation of the existing permit. The reference to 'Transfer of permits' in clause (*j*) of rule 3 of the U. P. State Road Transport Services (Development) Rules would be appropriate to a scheme prepared under the U. P. Act; but in my opinion it is not appropriate to a scheme prepared under section 68C of the Motor Vehicles Act. It is further to be observed that whereas under Chapter IV-A of the latter Act the authority on whom devolves the duty of preparing a scheme is the State transport undertaking, the authority which is envisaged by section 68G (2) as making the offer of a new permit is the Regional Transport Authority. I, therefore, do not think that there is any statutory provision which requires reference to be made in a scheme prepared under section 68C (where such a course is intended) for the offer of alternative routes.

Then arises the question, and it is the crucial question in this part of the case, whether section 68G (2) confers an unfettered power (not of course to be exercised arbitrarily) on the Regional Transport Authority to offer a displaced operator a permit for an alternative route or whether, as contended on behalf of the petitioner, this sub-section provides only an opportunity for the exercise of a power which is to be found in sections 47 and 48 of the Act. I do not think it is possible to reconcile the provisions of section 47 and 48 with those of section 68G (2). The latter envisages an offer of a permit being made by the Regional Transport Authority to the displaced operator and the acceptance by him of the offer. The initiative rests with the Regional Transport Authority Under Chapter IV, on the other hand, a stage carriage permit can be granted only after an application has been made for it. That application must contain the particulars prescribed by section 46, it must thereafter be considered by the Regional Transport Author-

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C J

rity in accordance with the procedure laid down in section 47 and section 48 provides that it can be granted only in respect of the route or area specified in the application.

Reliance has been placed by the respondents on section 43(1) of the Act which, so far as material, reads thus:

"43 *Power of State Government to control road transport* —

(1) A State Government, having regard to—

(*a*) the advantages offered to the public, trade and industry by the development of motor transport, and

(*b*) the desirability of co-ordinating road and rail transport, and

(*c*) the desirability of preventing the deterioration of the road system, and

(*d*) the desirability of preventing uneconomic competition among motor vehicles,

may from time to time, by notification in the official *Gazette* issue directions to the State Transport Authority—

(i)

(ii) .

(iii) . . regarding the grant of permits for alternative routes or areas, to persons in whose cases the existing permits are cancelled or the terms thereof are modified in exercise of the powers conferred by clause (*b*) or (*c*) of sub-section (2) of section 68F;

(iv) . . "

It is argued that these provisions indicate that the grant of permits for alternative routes is to be made under Chapter IV and that such permits cannot, there-

fore, be issued unless the provisions of that Chapter are first complied with This argument does not appear to be well founded In my opinion section 43 (1) empowers the State Government, if it thinks fit to do so, to issue directions of general application with regard to various matters including the grant of permits for alternative routes It assumed, I think, that it is within the powers of the State Transport Authority to ensure that such directions will be carried out by the Regional Transport Authorities, but it does not follow that the power of the Regional Transport Authority to grant a permit for an alternative route is to be found in Chapter IV In my opinion the power of the Regional Transport Authority to offer, and upon acceptance, to grant a permit for an alternative route to an operater whose permit has been cancelled under section 68 F, is to be found only in section 68 G (2); and the provisions of that sub-section, and of any order made thereunder, must by virtue of section 68 B, have effect notwithstanding anything inconsistent therewith to be found in Chapter IV

I am, therefore, with great respect, unable to agree with the learned Judge that the fact that the schemes did not provide for the grant of permits for alternative routes deprived the Regional Transport Authority of power to grant such permits Learned counsel for the respondents has, however, sought to support the order of the learned Judge on other grounds, and those grounds it is now necessary to consider

Mr. *Kacker's* contentions are, first that the notifications published on the 10th January and 6th June, 1959, under section 68 C of and 68 F (2), respectively, are invalid; and, Secondly, that in any event the grant of permits to the appellants in Appeal no. 11 was invalid because (*a*) upon such grant being made the limit on

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C J.

the number of stage carriages fixed for the Gorakhpur—Gola route under section 47 (3) was exceeded and, (*b*) such permits being in respect of a route for which no application had been made the grant involved a contravention of section 48 (1).

In my opinion there is no force in the two latter submissions which would be valid, if at all, only on the basis that the permits in question were granted by the Regional Transport Authority in exercise of its powers under Chapter IV. In my view, however, for reasons which I have stated earlier, the permits were granted by the Regional Transport Authority in exercise of its powers under section 68 G (2); and by virtue of section 68 B the grant was not invalid even if it were inconsistent with the provisions of Chapter IV.

Nor do I think that the submission that the notification under section 68 F (2) is invalid can be sustained That section, so far as is material, provides that—

> "(2) For the purpose of giving effect to the approved scheme in respect of a notified area or notified route the Regional Transport Authority may by order (*b*) cancel any existing permit"

By the impugned notification the existing permits of the three appellants were cancelled but the notification was issued by the Regional Transport Officer. The argument is that power to cancel an existing permit under this sub-section is vested exclusively in the Regional Transport Authority, that the notification is therefore invalid, and the notification being invalid the appellants' permit have not been cancelled and accordingly no question of the grant to them of permits for an alternative route arises. Now in the first place the cancellation of an existing permit for the purpose of giving effect to the approved scheme appears to me in the present case to be merely a ministerial act, and

even if the Regional Transport Officer had not the requisite authority I should not on that ground be prepared to hold that the matter was one which would justify interference by the Court in the exercise of its powers under Art. 226 of the Constitution In the second place the Regional Transport Officer purported to act in the exercise of powers which had been delegated to him under sub-section (5) of section 44 of the Act by the Regional Transport Authority, and in my opinion such delegation was valid. That sub-section provides that—

> "(5) The State Transport Authority and any Regional Transport Authority, if authorized in this behalf by rules made under section 68, may delegate such of its powers and functions to such authority or person and subject to such restrictions, limitations and conditions as may be prescribed by the said rules"

It is not in dispute that a rule has been made under section 68 purporting to authorize the Regional Transport Authority to delegate its functions, duties and powers under sub-sections (1) and (2) of section 68 F to the Regional Transport Officer [*see* rule 10 of the U. P. State Road Transport Services (Development) Rules, 1955] but it is contended that as section 68 only empowers a State Government to make rules for the purpose of carrying into effect the provisions of Chapter IV the Regional Transport Authority had no authority to delegate to the Regional Transport Officer a power conferred upon it by section 68 F which is to be found in Chapter IV-A I do not see sufficient reason why the power of delegation should be restricted to the delegation of powers and functions conferred upon the Regional Transport Authority by Chapter IV. Section 44 (5) imposes no such restriction; the only condition is that there must exist a rule made under section

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C. J.

68 authorizing the Regional Transport Authority to delegate its powers Such a rule has been made, and in my opinion it is a valid rule

Finally, the validity of the notification under section 68 C, dated the 23rd December, 1958, and published in the official *Gazette* on the 10th January, 1959, is challenged primarily on the ground that the opinion expressed therein that it is necessary in the public interest that certain road transport services should be operated by the State transport undertaking must be the opinion of that undertaking and not the opinion of the State Government The two opening paragraphs of the notification to which exception is taken read as follows

> "Whereas the State Government is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated Road Transport Service, it is necessary in the public interest that Road Transport Services on the routes mentioned at item no 2 of the annexed schemes should be run and operated by the State transport undertaking to the complete exclusion of other persons
>
> Now, therefore, in exercise of the powers conferred by section 68 C of the Motor Vehicles Act, 1939, read with rule 4 (1) of the Uttar Pradesh State Road Transport Services (Development) Rules, 1958, the Governor of Uttar Pradesh is pleased to publish the schemes hereto annexed in respect of State Road Transport Services framed in pursuance of section 68 C of the said Act. Copies of each of the schemes will also be found pasted on the notice-boards of the offices of the State Transport Authority and the Regional Transport Authority concerned. Any person whose interests are

affected by these schemes may, within thirty days of the date of publication of the schemes in the official *Gazette,* file objection, if any, before the Secretary to Government, Uttar Pradesh, in the Transport Department in accordance with the procedure laid down in rule 5 of the above-mentioned rules A person affected by the scheme and agreeing to its provisions shall express his agreement in accordance with rule 6 of the said rules in form no. II within the time specified above for filing objections."

Now, section 68 C reads thus:

"68 C. *Preparation and publication of scheme of road transport service of a State transport undertaking*—Where any State transport undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State transport undertaking, whether to the exclusion, complete or partial, of other persons or otherwise, the State transport undertaking may prepare a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed, and shall cause every such scheme to be published in the official *Gazette* and also in such other manner as the State Government may direct."

Mr. *Kacker's* argument is that this section imposes upon the State transport undertaking the duty of form-

1961

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Mootham, C. J.

ing an opinion whether it is necessary in the public interest that a road transport service should be run or operated by itself, and if it be of that opinion it is also the duty of the undertaking to prepare and cause to be published a scheme in accordance with the provisions of section 68 C. The impugned notification, it is argued, shows that the decision as to the desirability of certain road transport services being operated by the State transport undertaking was formed by the State Government, that it was the Governor who prepared and caused the proposed scheme to be published and that as this was contrary to the Act the notification and all subsequent orders and decisions based thereon are invalid.

'State transport undertaking' means any undertaking providing a road transport service where such transport services is carried on *inter alia* by a State Government. The State transport undertaking is a statutory authority, and it is common ground in the present case that the Transport Department of the State Government functioned as that authority. It was therefore, a necessary prerequisite for a valid scheme that the Transport Department should have formed the opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service the particular road transport services referred to in the impugned notification should be run and operated by the State transport undertaking The real question which arises, in my opinion, is whether it did so or whether that opinion was formed by the State Government. This is a question of fact. It is true that the notification states that the opinion which section 68 C requires to be formed was that of the State Government, but I do not think that to be conclusive. It is argued for the appellants that the re-

quisite opinion was in fact formed by the Transport Department functioning as the State transport undertaking, but that as any action taken by the Transport Department is a part of the executive action of the State Government, Art 166 (1) of the Constitution requires all such action to be expressed to be taken in the name of the Government In reply to this argument it was contended that the State transport undertaking being a statutory authority invested by law with specific powers, duties and liabilities, the functions entrusted to it were not within the executive powers of the State Government and ought not, therefore, to be expressed to be taken in the name of the Government On this question I think it unnecessary to express an opinion, for it is not argued that the appellants are debarred from showing that in fact the requisite opinion was formed and the scheme prepared by the Transport Department functioning as the State transport undertaking and not by the State Government

The evidence is unsatisfactory Sri Kashi Prasad Gupta relies on the statement in the impugned notification itself that the State Government had formed the opinion that a properly co-ordinated road transport service was necessary in the public interest, and that he does so is made clear in paragraph 25 of his original affidavit For some reason not immediately apparent the counter-affidavit filed on behalf of the Regional Transport Authority is sworn by one Girja Prasad, a stenographer in the office of the Regional Transport Authority, Gorakhpur, who has no personal knowledge of any of the facts to which he deposes other than that he is a stenographer and has read and understood the respondent's affidavit His affidavit accordingly throws no light on the matter under consideration; and it appears that the importance of the question was not appreciated by the Regional Transport Authority or

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

its advisers for in paragraph 11 of his affidavit Girja Prasad says.

> "That with respect to the contents of paras 22 to 29 of the said affidavit it is stated that the same raise legal issues and it is not necessary to reply the same in this affidavit"

The question is important. it concerns the validity of the entire scheme and the burden in this case lies on the appellants of showing that the provisions of section 68 C were complied with They have not done so As, however, I am of opinion that the appeals must be allowed on other grounds it is unnecessary to consider whether the appellants should now be afforded an opportunity of filing a supplementary counter-affidavit or affidavits for the purpose of clarifying the position

I would allow the appeals with costs against Sri Kashi Prasad Gupta

DHAVAN, J These two connected appeals raise an important question concerning the jurisdiction of the High Court under Article 226 which may be formulated thus. First, has the Court the power to consider the legality of an order at the instance of a petitioner whose sole grievance is that the order, by permitting other persons to carry on the same business in the same area, is likely to intensify competition against him and thereby cause a fall in his profits; and secondly, is the owner of a motor bus operating on a route under a valid permit entitled, under Article 226, to attack the legality of a permit issued to another person for the same route in lieu of compensation due to him under section 68 G(2) of the Motor Vehicles Act, on the sole grievance that it is likely to expose him to competition and reduce his profits from his own bus, even though he cannot show that any right of his has been

curtailed ? These are two sides of the same question, and raise the further question who is an "aggrieved person" entitled to ask for the protection of the High Court under Article 226 They also involve to some extent an interpretation of the words "for any other purpose" at the end of Article 226 (1)

The facts of this appeal have been detailed in the judgment of the learned Chief Justice (which I have had the privilege to read), may very briefly be summarised thus The respondent (petitioner in the petition under Article 226) Kashi Prasad Gupta is the owner of a passenger motor bus operating on a certain route in Gorakhpur District known as the Gorakhpur—Gola Route The right to ply buses is regulated by the Motor Vehicles Act which enjoins that no person can operate a bus without obtaining a permit from the Regional Transport Authority Gupta obtained such a permit, and has the right to ply his buses on this route subject to such reasonable restrictions as may be imposed in the public interest It is not *Gupta's* case that he has been subjected to any unreasonable restriction

But recently the State "nationalized" a certain route (not Kashi Prasad Gupta's) under a scheme made under Chapter IV-A of the Motor Vehicles Act Consequently the permits of all persons plying passengers buses on that route were cancelled and they became entitled to compensation under section 68G of the Act Three of them, who are the appellants in appeal no 11 and the respondents in appeal no 8 filed by the State, supporting that appeal and opposing Gupta, were offered and accepted in lieu of compensation, permits "transferring" them to the Gorakhpur—Gola Route, that is to say, enabling them to ply their buses on the route on which Kashi Prasad Gupta is plying his bus. Gupta claims to be

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J

aggrieved by this arrangement and has come to this Court under Article 226 of the Constitution impugning the legality of the decision entitling the three displaced owners to ply on the route on which his bus is running. He alleges that the permits granted these persons, not having been issued in accordance with law, are of no effect and give the displaced persons no right to ply the buses on the petitioner's route. He claims to be aggrieved by this decision on the ground that the operation of more buses is likely to intensify the competition on a route which, according to him, is already "uneconomic", and thus to reduce his profits. This is the sum total of the petitioner's grievance in this case.

The first question in this case is whether this Court, on the facts stated in Kashi Prasad Gupta's petition, has any jurisdiction to interfere. Gupta claims to be an "aggrieved person" and therefore entitled to ask for relief. He pleads that the entry with illegal permits of the three displaced operators on the same route is likely to intensify the competition which in turn is likely to cause a fall in the rate of profit from his own business. Several questions arise out of this plea-first whether there is any basis for the apprehension that the entry of the three buses on this route will intensify competition, secondly, assuming that the competition will intensify, there is any basis for the further apprehension that the rate of profit in Gupta's business will fall; and thirdly, assuming that there is some basis for both these apprehensions, whether this entitles Gupta to claim that there has been an infringement of his right and empowers this Court to interfere under Article 226.

I propose to ask the last question first, for I am of the opinion that even if Gupta had proved that his profits are likely to be affected—which he has not—this Court has no jurisdiction to interfere in this case.

Mr *S. N. Kacker*, who appeared for Kashi Prasad Gupta and argued his case with ability, relied on a few English decisions in support of his argument that the power of this Court to issue writ is governed by the board principles of English law which regulate the exercise of jurisdiction by the Court of Queen's Bench to issue these writs, I shall refer to these cases presently But at the outset I must state my opinion that English authorities cannot be any guide in determining the jurisdiction of the Indian High Courts under Article 226 of our Constitution

As is well known, there is a distinction between the jurisdiction of a court and its exercise By way of illustration I may refer to the jurisdiction of the Supreme Court under Article 32 That Court has been invested with the power to issue directions or orders or writs for the enforcement of any fundamental rights The writs mentioned in this Articles are those which the Court of the Queen's Bench has issued for centuries in accordance with certain principles. But the principles of English law cannot determine the jurisdiction of the Supreme Court, for it can entertain a petition under Article 32 only for the enforcement of rights conferred in Part III of the Constitution *Sahibzada saiyed Muhamed Amir Abbasi* v *State of Madhya Bharat* (1) The petitioner must, therefore, show that he has a fundamental right which has been or is in imminent danger of being violated. If he cannot, the Supreme Court has no jurisdiction to interfere even if the English Courts could have interfered in similar circumstances For example, in a petition for the issue of *certiorari*, however gross the error committed by a tribunal, if it falls short of infringement of a fundamental right the Supreme Court has no power to entertain the petition The very jurisdiction is lacking

(1) A I R 1960 S C 768

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J

But if the petitioner proves that any of his fundamental rights has been infringed by the order of the tribunal, the jurisdiction of the Court will immediately arise and be exercised in accordance with the broad principles which govern the issue of *certiorari* by the Court of the Queen's Bench But these principles are not the foundation of its jurisdiction they only prescribe the manner and conditions of its exercise

The Supreme Court observed in *T Nagappa* v. *T C. Basappa* (1)

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law; nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law"

The meaning of this observations, as I understand it, is that the broad and fundamental principles of English law should regulate the *exercise* of jurisdiction under Article 32, not that they can *confer* jurisdiction on the Supreme Court, which flows from the Article itself and no other source

I have referred to the power of the Supreme Court under Article 32 to illustrate the distinction between jurisdiction and its exercise The power of the High Court to issue *certiorari* and other writs or orders is conferred by Article 226 and is wider than that of the Supreme Court (except territorially) It extends not only to the enforcement of fundamental rights but

(1) AIR 1955 S C. 756.

"for any other purpose" But the last four words within quotation do not have the effect of conferring upon the High Courts unlimited powers of interference nor do they mean that these powers shall be co-extensive with that of the Court of the Queen's Bench in England As I shall show presently, in spite of these words, the powers of the High Courts are in some respect wider and in others more restricted than those of the Queen's Bench At present I am concerned with the meaning of these words and to show that they do not give this Court any jurisdiction to interfere in a case like the one before us

The meaning and scope of the words "for any other purpose" has been interpreted by the Supreme Court in the *State of Orissa* v *Madan Gopal Rungta* (1), where it was held .

> 'The language of the Article shows that the issue of writs or directions by the Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution (fundamental rights) has been infringed. It can also issue writs or give similar directions for any other purpose The concluding words of Article 226 have to be read in the context of what precedes the same Therefore, the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article"

The words "foundation of the exercise of the jurisdiction of the Court under this Article" are crystal clear They mean that if there is no right in need of protection, the High Court cannot interfere even if the English Court could under similar circumstances

Only if the petitioner has proved the existence of any right which has been or is in danger of being infring-

(1) AIR 1952 S C 12

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J.

ed, the jurisdiction of the High Court is established Then, but not before, the stage of the *exercise* of the jurisdiction will arise and the principles of English law may be consulted For example, if the petitioner's right has been infringed by an order of any judicial tribunal and he has prayed for a writ of *certiorari* to quash it, the High Court will follow the broad principles of English law in considering whether *certiorari* ought to go It will inquire if the tribunal has acted without jurisdiction or in excess of it, or has been guilty of any error apparent on the face of the record or has violated any principles of natural justice, if so, it will issue the writ and quash the decision of the tribunal

The Supreme Court has held that the High Court shall interfere by *certiorari* on more or less the same grounds on which the Court of Kings Bench would It was in this contest that the Supreme court made the observation in *Election Commission of India* v. *S. Venkata Rao* (1) The makers of the Constitution conferred in the States' sphere, now and wide powers on the High Court of issuing directions, orders, or writs primarily for the enforcements of fundamental rights; the power to issue such directions for any other purpose " being also included with a view apparently to place all the High Courts in this country, in somewhat the same position as the Court of the King's Bench in England "

Does this observation have the effect of modifying the considered decision in *State of Orissa* v. *Madan Gopal* (2) that the existence of a right is the foundation of the High Court's jurisdiction under Article 226? I think not The words are not "in the same position" but "*somewhat in the same position*" Somewhat means in some degree or measure The

(1) 1953 S C R 1144, 1150 (2) A I R 1952 S C 12, 13

Supreme Court meant that the High Court's powers were somewhat similar to those of the Queen's Bench, but they could not have meant that the two powers are identical in scope and purpose There is nothing in this observation which qualifies in the slightest degree the considered view of the Court in *Madan Gopal's* case (1) that the existence of a right is the foundation of the jurisdiction of the High Court The phrase "somewhat similar" describes the *approximate* factual position, for in the majority of English cases, too, in which *certiorari* is issued, there is usually an infringment of a legal right vested in the petitioner But this does not alter the fundamental fact that the foundations of the jurisdiction of the two Courts are different —one originated in the prerogative of the English Crown and is now based on statute, and the other flows from Article 226 of the Indian Constitution

As stated above, counsel for Kashi Prasad Gupta has relied on one or two English cases in which a person was permitted to move the Court of King's Bench for a writ or *certiorari* to quash an order of a tribunal even though it did not directly infringe any legal right vested in him I shall consider these cases presently. At the very outset however, I must point out that the principles of English law cannot lead us to the source of the jurisdiction of the High Court, for the origin of the prerogative writs in England was for a purpose fundamentally different from what the makers of our Constitution had in mind when conferring upon the Indian High Courts the power to issue writs, orders or directions under Article 226 of the Constitution

To discover the purpose of the English prerogative writs it is necessary to refer to the history of English law After 1066 the Norman Kings sought to establish a strong central authority operating from West-

(1) AIR 1952 S C. 12, 13.

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J

minister. One of their instruments for achieving this purpose was the creation of a central court which would displace the innumerable local courts The *curis regis* or the King's council, was the foundation of a centralized judicial system from the time of William the Conqueor. The King of England reserved to himself judicial powers, and in course of time, the Court of King's Bench became a separate court For a long time it " drew much of its authority from the fact that it was still held in the presence of the King . . In fact the Court of King's Bench only gradually became a separate court of common law as it lest, in the course of the fourteenth century, its formal close connections with the King himself and the Kings Council" *A History of English law* by Sir William Holdsworth, Volume 1, The Judicial System, pp 206-207.

The establishment of the authority of the royal courts over the innumerable local courts of the feudal lords was a process which was speared over several centuries. One of the many weapons employed by the King was the issue of writs in the exercise of his royal prerogative, which clothed the King with extraordinary powers (hence the name of prerogative writ). "We may say that the prerogative was the power of the King to do things which no one less could do, and his power to do them in a way in which no one else could do . "Constitutional History of England, by G. B Adams, 1949 Edition, p 78.

All the writs had a common characteristic: they enabled the King to exercise his power of superintendence over the local courts, officials and others Even *habeas corpus* which today is a bulwork of personal freedom was "originally .a writ by which a court could bring before itself persons whose presence was necessary for some legal proceeding pending before it;

and some forms of the writ never ceased to be merely procedural"—Holdsworth, *ibid* p. 227

Quo warrante was a writ "in the nature of a writ of right for the King against persons who claimed or usurped any office, franchise, liberty, or privilege belonging to the crown, to enquire by what authority they maintained their claim in order to have the right determined"—*Ibid,* p 229. The purpose of this writ was not to safeguard the rights of aggrieved persons but to curb the pretensions of the feudal lords and extend the authority of the King *Mandamus* was a "command issuing in the King's name from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature, within the King's dominions; requiring them to do some particular thing therein specified, which appertains to their office or duty" *Ibid,* p 229 *Certiorari* "is an original writ which can be issued out of the Chancery or the King's Bench when the King desires to be certified of any record made by any court of record, or by certain officials, e g Sheriff or the Coroners Thus . . . indictments can be removed from the itinerant justices by this writ to the King's Bench" *Prohibition* is a writ "issuing properly only out of the court of King's Bench, being the King's prerogative writ;. . . directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein does not belong to that jurisdiction"

Thus all the high prerogative writs were preliminary legal devices by which the Norman and Plantagent kings extended the power of the Royal Courts and curbed those of the local courts, and forged a judicial system enforcing a common law over the entire realm.

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J

The king did not confine himself to the writs above mentioned. By another writ called *praecipe,* "which was addressed to the Sheriff, the king directed him to command the defendant in a particular dispute over land pending in the baronial court to return at once to the plaintiff the land in dispute or else to appear in the King's court and explain why he had not done so, that is why he had not obeyed the King's command."— Adams, *ibid,* p 108 "The writ assumed the plaintiffs' case to be just and was based on the duty of the King to secure justice for all It passed over the feudal law and the rights of the feudal lord entirely and fell back on a higher conception of the royal office, not as lord paramount of the realm, but as representative of the divine gorvernment of the world, which the medieval theory assumed the King to be In this way it was a direct attack upon the feudal government of the State and a long step towards recovering the rights of jurisdiction which had been allowed to fall into private possession."

ibid, p 108.

But the establishment of the authority of the King over the barons and of his courts over the innumerable local courts of the feudal lords was not an easy process; it was achieved after a long struggle in which there were many set-backs. The barons often defined the authority of the King Clause 34 of the Magna Carta was directed against the writ of *praecipe* and reveals the stiff opposition of the barons to the extension of the royal justice at the expense of their feudal courts. It forbade the King to issue the writ of *praecipe* in such a way as to remove a case from a private court into the King's

The writ of *quo warranto,* which originated in the reign of Edward I also met with strong opposition from the barons. "In another statute, that of Gloucester

(1278), Edward tried to check the legal power of feudal lords. This statute instructed the King's justices when they went on their tours to enquire by what right (*quo warranto*) the feudal lords were holding courts He meant to deprive persons who could not produce royal charters, of the right to hold such courts But the barons resisted strongly. Earl Warenne made the famous reply, as he unsheathed his sword, 'Here is my warrant'. Ultimately Edward compromised and allowed any baron who could prove that the right had been exercised since the days of Richard I to continue to exercise it".

Thus the prerogative writs were royal weapons in the struggle of the central government against the local lords. The King and his itinerant judges made use of them freely—*suo motu* as well as at the instance of persons who were interested in the extension of the authority of the King's courts With the King and his courts in an expansionist mood, the words "aggrieved person" were given a liberal meaning, and it was not necessary, for the purpose of persuading the King or his Court to interfere with the jurisdiction of other Courts, to establish the infringement of a legal rights. The existence of a legal right has never been the foundation of the writ jurisdiction of the King's Bench. That foundation is the prerogative "which enabled the King to do what no one else could do."

Today the ancient prerogative writs have acquired new content But their origin and the traditions which attached themselves to these writs in the early stages of their development influence the conditions of their issue even today. "English lawyers must know something of the nature of the courts in which these cases were decided, and something of their procedure and jurisdiction Much more is this knowledge necessary to an understanding of the history of English law. In-

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J

deed, without it no profitable study of English legal history is possible For the English judicial system is, so to speak, the skeleton round which the rules of English law have grown up; and the gradual evolution of the form of this skeleton has determined the large outstanding characteristics of the evergrowing body of English law" —Holdsworth, *ibid,* p 2 Even today the petitioner who moves the Queen's Bench for *certiorari* has to prove that he is an aggreived person but not necessarily the infringement of a legal right vested in him

It is against this historical background that I have to consider the argument of learned counsel for Gupta that a person who would be entitled to apply for an order in England is entitled to apply for a writ in India

I agree that the High Court *when* exercising its power of issuing writs of *certiorari* or mandamus should ordinarily apply the principles regulating the issue of such writs in England, but would add the qualification that the exercise of the power under Article 226 being discretionary, the High Courts will take into account Indian conditions when exercising their discretion

But I am unable to agree that the foundation of the jurisdiction of the English and the Indian courts is the same or that the power of the High Courts in India to issue writs, orders or directions under Article 226 is co-extensive with that of the English Courts Learned counsel has based his arguments on the observation of MUKHERJEA, J. in *Election Commission, India* v. *S Venkta Subba Rao* (1) (repeated in *Nagappa* v. *Basappa* (2)) to the effect that the words "any other purpose" in Article 226 have been included with a view apparently

(1) 1953 S C R 1144, 1150. (2) A I R. 1955 S C 756

to place all the High Courts in this country in somewhat the same position as the King's Bench in England.

In my view, we cannot read into these words anything more than an approximate comparison The words "for any other purpose" do not have the effect of giving the High Court the same powers as the Court of the Queen's Bench In spite of them, the High Court's powers are in some respect much wider, and in others not so wide The High Court can issue writs against the State which the Queen's Bench cannot. Secondly, the High Court's power is not confined to the issue of the five prerogative writs mentioned in the Article; it can issue any orders or directions if in a particular case adequate justice cannot be done by the issue of the prerogative writs Thirdly, the High Court can quash even executive or administrative orders which the Queen's Bench cannot *Rashid Ahmad* v *Municipal Board Kairana,* (1) was a case under Article 32 but the principles stated therein will apply equally to Article 226 In *Rameshwar Prasad* v *District Magistrate* (2), MOOTHAM, J (as he then was) held that the impugned order refusing to renew the patitioner's licence being an administrative act, the High Court had no power to interfere by *certiorari* but had the power under Article 226 to quash it After reviewing the English principles regulating the issue of *certiorari* he observed.

> "I am therefore of the opinion that the act of the licensing authority in refusing to renew the petitioner's licence was an administrative act and that accordingly this Court cannot interfere with such order by a writ in the nature of *certiorari* I venture to think, however, that the question whether the licensing authority acted quasi-judicially

(1) A I R. 1950 S C 163 (2) A. I R 1954 All 144

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J.

or ministerially is one which is somewhat unreal This Court has the power under Article 226 of the Constitution to issue directions, and orders, as well as writs, for any purpose, *and in the exercise of that power* (*italics mine*) it can direct that an administrative power be quashed."

The fundamental difference between the power under the English law and under Article 226 could not have been recognised more clearly. Fourthly, where a fundamental right is in jeopardy, the existence of an adequate alternative remedy is no bar against the issue of a suitable writ under Article 226 whereas the Queen's Bench will not issue *mandamus* or *certiorari* if an alternative remedy is available. In *Himmat Lal* v. *State of Madhya Pradesh* (1), following an earlier decision in *State of Bombay* v *United Motor (India) Ltd.* (2), the Supreme Court held that "the principle that a court will not issue a prerogative writ when an adequate alternative remedy was available does not apply where a party has come to the Court with an allegation that his fundamental right had been infringed and sought relief under Article 226"

In some other respects the powers of the High Court are narrower than those of the Queen's Bench, being limited by the words of Article 226. First, "the writs (or orders) issued by the Court cannot run beyond the territories subject to its jurisdiction." Secondly, the person or authority to whom the High Court is empowered to issue such writs must be "within those territories". *Election Commission* v *Venkata Rao* (3) *Thirdly,* the existence of some legal right "is the foundation of the exercise of jurisdiction of the (High) Court under this article". *State of Orissa* v *Madan Gopal Rungta* (4).

(1) A I R 1954 S C 403
(2) A I R 1953 S C 352
(3) A I R 1953 S C. 210, 212
(4) A I.R 1952 S. C 12, 13

Thus in spite of the words "for any other purpose", the jurisdiction of the High Court under Article 226 is neither identical nor co-extensive with that of the Queen's Bench

The meaning of the words "for any purpose" and the scope of the powers of the High Court under Article 226 had been settled by the Supreme Court by several decisions when the case of *T. Nagappa* v *T C. Basappa* was argued before it. It is thus obvious that by their observation in *Election Commission* v *Venkata Rao* (1) the Supreme Court could not have meant that the words "for any purpose" in Article 226 have the effect of making the power or jurisdiction of the High Court identical or co-extensive with those of the Queen's Bench. This observation was made *en passant* and could not have been made with the intention to overrule the earlier and considered decisions of the Supreme Court in *State of Orissa* v *Madan Gopal* (2), *Rashid Ahmad* v. *Municipal Board, Kairana* (3) and *Himmat Lal* v *State of Madhya Pradesh* (4). In my view, the word 'somewhat' indicates that the Supreme Court did not intend the observation to be interpreted with mathematical precision or to lay down a principle so obviously at variance with the constitutional position and with their own earlier interpretations of Article 226.

I am therefore of the opinion that the principle laid down by the Supreme Court in *Madan Gopal's* case is still in full force and will govern the case before us. Unless this Court finds that a right of the petitioner has been infringed, it has no jurisdiction to entertain this petition.

(1) A I R 1953 S C 210, 212.
(2) A I R. 1952 S C 12, 13
(3) A I R 1950 S C 163.
(4) A I R. 1954 S. C. 403.

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J.

Furthermore, the nature of the reliefs claimed by Kashi Prasad Gupta in the present case excludes the application of English principles governing the issue of *certiorari* In the first place, he wants this Court to quash the resolution no 32 passed by the Regional Transport Authority in its meeting on 26th September, 1959, stating that the three displaced operators were offered the alternative route Gorakhpur-Gola in lieu of compensation under section 68-G (2), Chapter IV-A of the Motor Vehicles Act and had accepted the offer It is not clear whether this resolution merely recorded the simple fact that an offer had been made and accepted before the meeting, or is a written memorandum of the acceptance of an offer made in the meeting itself In either case, the resolution is merely the evidence of an agreement There is hardly any point in quashing a document which is no more than evidence of a fact

I have grave doubt whether the High Court can quash the agreement itself Government can certainly quash any order of Government, but an agreement is created by a unilateral decision or order. It is founded on consensus and arises when an offer made by one party is accepted by the offeree. No order issued to the Transport Authorities can quash an agreement which has been made already and is enforceable at law at the instance of the other party However, the Court should not take a technical view of any linguistic defect in the relief claimed by a petition under Article 226 and should try to understand the essence of his prayer and then frame the relief itself, if possible I am, therefore, prepared to interpret the first relief as a prayer that the Government should not enforce the agreement embodied in Resolution no. 32. But even this relief cannot be granted, for the agreement has been executed already and a permit issued. There is nothing fur-

ther to be done by Government which it can be asked not to do Thus it is not possible to grant the first relief

The petitioner's second prayer is for a writ of *mandamus* commanding the Regional Transport Authority and its Secretary to forbear from placing the displaced operators on the Gorakhpur-Gola route otherwise than in accordance with law Legally the relief as framed does not make sense The Transport authorities cannot "place" any operator on any route They can only grant him a permit, after which he "places" himself on the route covered by the permit. In the present case, the Regional Transport Authority made an offer which was accepted by each of the three displaced operators, and the permits were granted After this, that authority did nothing by way of "placing" these operators on the route They started running their buses on this route Now this Court can issue no orders under Article 226 to these operators It can only quash the permits which have enabled them to operate on this route The second relief, as framed, is meaningless and cannot be considered

It may, however, be argued that a permit was issued in pursuance of the acceptance of the offer by the displaced operators, and that a *mandamus* should issue to prevent Government from giving effect to the permit issued under section 68-G. This too cannot be granted as long as the permits are intact. To command the Government not to enforce them is to ask it to commit breach of contract after its offer had been accepted by the displaced operators The accepted the permits on the alternative route in lieu of compensation to which they are entitled The agreement is enforceable under the law This Court cannot in the exercise of its powers under Article 226 put any responsible authority in a dilemma either to obey the Court's order and break

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J

a contract or honour the agreement and disobey the Court's order. This Court cannot leave the permits intact but command the authorities not to recognize them Nothing could be more inconsistent or unfair. The petitioner has made no prayer for the quashing of the permits. But here again I am prepared not to take a technical view of the defects in the framing of the relief and to treat the second prayer as for quashing the permits The grant of a permit as the result of the acceptance of an offer under section 69-G (2) is not a quasi-judicial but an administrative act. It is not amenable to *certiorari* and the English principles governing the issue of this writ will not apply in the present case.

As held by MOOTHAM and SAPRU, JJ in *Rameshwar Prasad's case* (1) the High Court's power under Article 226 are wider and it can quash any administrative order of executive decision of the Government or any person in authority in a suitable case Therefore, the power to quash the permits must be derived from this Article or not at all If an executive or administrative decision cannot be quashed by *certiorari,* the English test of "aggreived person" which is somewhat lax, does not apply to such a case, and the argument that Kashi Prasad Gupta must be recognized as an aggrieved person in this case simply because he would be so regarded in a petition for *certiorari* in England falls to the ground. As this is a petition under Article 226, he must show that the impugned executive decision has infringed a right vested in him before this Court can exercise its powers under that Article.

I shall now consider whether any right of the petitioner has been infringed. He has come with something dressed up as grievance, but the question is whether this "grievance" has any legal substance. I do not think it has.

(1) A I R. 1954 All 144.

As stated previously, Kashi Prasad Gupta is the owner of a motor bus operating on a certain route The right to ply motor buses for hire is regulated by the Motor Vehicles Act which enjoins that any person plying a passenger bus must first obtain a permit from the Regional Transport Authority Gupta has obtained such a permit Consequently, he has the right to use the highway for the purpose of plying his buses on this route subject to the right of all other persons to use it and subject to such reasonable restrictions as the State may impose in the public interest He continues to enjoy this right to the fullest degree There is no suggestion that as a result of the grant of the three impugned permits Gupta's right to use the highway has been taken away or unreasonably restricted. But he claims the further right to keep out any other person who does not possess a valid permit He complains that the entry, with illegal permits, of the three displaced operators on the same route is likely to intensify competition which in turn is likely to cause a fall in the rate of profit from his own business Even assuming that there is some basis for his apprehensions, does this entitle him to challenge the legality of their permits on this grievance alone ? I know of no law under which he can claim this right.

The Gorakhpur-Gola route is a public highway owned by the State. There is a dedication in favour of the public, every member of which has the right to pass and repass. But the ownership in the highway vests in the State, and it can close or destroy any particular highway at any time without consulting anybody. It can restrict or regulate even the right to pass over it. No one can question these rights of the State.

If the Motor Vehicles Act had given no power on the Transport authorities to limit the number of motor vehicles plying on a route, Gupta could not have

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J

objected on the ground of uneconomic competition. Under the law, no businessman can prevent a hundred others from opening rival shops in his locality. The resulting competition may hit him, but the law provides no remedy against competition, however severe All businessmen have to adjust themselves to the economic forces of supply and demand without interference from the law No one can claim a monopoly or near-monopoly or shelter from competition in any business or enterprise The Constitution guarantees the equal right of every citizen to follow any trade or business subject to reasonable restrictions in the public interest. Any attempt to keep out others with the help of the State would be unconstitutional Therefore, under the law, a bus operator cannot ask the Court to protect him from what he regards as uneconomic competition.

Does he acquire this right by virtue of the restrictions imposed under the Motor Vehicles Act ? I think not That Act does not confer upon any permit-holder immunity against competition, nor does it increase the legal content of the right to carry on the business of running motor buses, it only imposes restriction *in the public interest.* Its purpose is not to create a monopoly or near-monopoly or a sheltered business in favour of a few and to protect these few from uneconomic competition, but to safeguard the interest of the public by regulaing a form of transport which is driven by power at high speed and potentially dangerous. The regulations under the Motor Vihicles Act are stringent but their purpose is to ensure the safety and convenience of the travelling public and not to guarantee a minimum rate of profit and immunity against open competition for those who obtain permits. It is necessary to emphasise this primary object of the restrictions imposed

under the Act in order to remove the misunderstanding created by certain parts of the Act which enable certain classes of persons to oppose the grant of a permit or make representations against such grant

There is a fundamental objection to Gupta's petition The Motor Vehicles Act creates no vested right in him Like any other law regulating a peculiar kind of business by means of a permit or licensing system, this Act is in the nature of a *restriction* on the right to carry on the business of transporting passengers by motor bus, and does not add to the legal content of this right The *incidental* result of the permit system may be to confine the business for the time being to a few permit-holders and thus benefit them *indirectly* But the permits do not confer any exclusive franchise on their holders Benefits which flow incidentally from a system of restrictions create no vested right in those who enjoy them for the time being For example under the excise laws, the number of licences for selling alcoholic liquors is limited in the public interest, with the result that those who succeed in obtaining permits may benefit indirectly from the permit system In fact, in certain areas a licence to sell foreign liquor may be veritable gold mine- as in Delhi today Again, in a controlled economy under which the number of licences for selling essential commodities like cloth or sugar may be limited, all those who obtain licences may derive great benefit indirectly, from the restrictions But they acquire no vested right in these benefits, and cannot acquire the right to challenge the legality of any other person's licence on the ground that the illegal licence will expose them to greater competition If a person is found carrying on business without a licence or permit, he incurs the penalities of the law and the remedy is to lay information for the prosecution of the offender for breach of the control regulations Similarly, under the

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J

Motor Vehicles Act, all those who succeed in obtaining permits benefit incidentally from the permit system and enjoy for the time being a comparative immunity from open competition. But they acquire no vested right in this immunity and do not acquire the right to challange the legality of a rival's permit on the ground of apprehension of increased competition If any person plies a motor bus without a valid permit this is a matter between him and the State and the proper remedy is to lay information against him. But to hold that in a business subject to the restrictions of a permit or licensing system, a permit holder has the right to challenge the legality of another's permit on the ground that it will intensify competition is to create a *vested* right in the benefits which are merely incidental to the restrictions

The permit or licence under the Motor Vehicles Act merely removes a restriction on a right which is inherent and guaranteed by the Constitution But a restriction cannot be an addition. and the removal of a restriction cannot increase the original content of the right, if any, amending the Motor Vehicles Act, the State were to remove the limit on the number of buses on all routes (while preserving all the other restrictions) no bus owner could object to competition from new comers in the business I do not understand how he can object simply because there is a permit system He cannot say, "The permit system may have been made in the public interest, but it benefits me incidentally, therefore, I have acquired a vested right in the immunity from competition" If this argument is accepted it will lead to the paradox that the restrictions on a right can increase the legal content of that right

To sum up my opinion on this point, any immunity from open competition enjoyed by the holder of a permit under the Motor Vehicles Act is an incidental

and indirect benefit resulting from the restrictions imposed on the motor transport business and create no vested right in him It cannot be used as a legal weapon for keeping out others from the business or to challenge the legality of another person's permit

There is no provision in the Motor Vehicles Act which entitles the holder of a permit to raise an objection against the grant of permit to another person on the grievance that competition from the new-comer may reduce his profits. The State has been given the power, *in the interest of public safety and convenience,* to limit the number of buses plying on any route One obvious result of such a limit must be that every one cannot ply a motor bus on a route of his own choice The Act ensures that every citizen shall have an equal opportunity to apply for a permit and have his claim considered It prescribes an elaborate procedure for receiving applications, objections, the matters to be considered before granting a permit, and for appeal against the selection of a particular applicant among many There is a further provision for considering representations from persons who have not applied for a permit but are opposed to the grant of a particular permit These include persons already providing passenger transport facilities by any means along or near the proposed route or area, or by any association representing persons interested in the provision of road transport facilities recognized in this behalf by the State Government, or by local authority or police authority within whose jurisdiction any part of the proposed route or area lies This is provided under section 47 of the Act, which extends the privilege of making representations to several classes of persons whose rights are not affected—as for example, the police and the local authorities The matters which the Regional

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Transport Authority must consider before granting a permit include those specified in section 47, clauses (*a*) to (*f*) They all relate to matters of public interest and have little to do with the mercenary interests of bus operators already plying on the route

There does not appear to be any provision in the Motor Vehicles Act which confers upon a bus operator the right to object to a grant of permit to another person on the ground that it will result in loss of profit to him He can object that the existing facilities are adequate but this objection must be in the interest of the travelling public, not his private interest in maintaining a certain rate of profit for himself His *real motive* may be to preserve his own profits, but he must show the transport authority why it is not in the public interest to grant a fresh permit on that route He may be able to give convincing reasons If a hundred buses are permitted on a route where one would be adequate the remaining ninety-nine would be a nuisance to the travelling public Any one who has been pestered by tongas or rickshaws outside a railway station will agree that it is in the interest of the public that the supply of vehicles should not be very much in excess of the demand Here the interests of the public and the bus owners already operating on the route will coincide But the vital point to note is that the purpose of hearing representations under section 47 is to safeguard the interest of the public and not any private person's rate of profit.

If section 47 were interpreted to mean that the State can take private interests into consideration and refuse a permit on the ground that the addition of another operator will reduce the profits of those already in the business, the result would be to confer upon persons in the motor bus trade an immunity against competi-

tion a guarantee of minimum rate of profit which is denied to persons engaged in other trades and industries It could not have been the intention of the legislature to pass the Motor Vehicles Act to place persons engaged in the motor bus trade in a more favourable position, as regards the right to profits, than those in other trades The purpose of hearing representations under section 47(1) is to safeguard the interests of the public, though the *indirect* result may be to limit the number of bus operators on a particular route But no operator can acquire a *vested* interest in this limit or to demand that the limit should not be exceeded lest his rate of profit may fall The Act confers no power on any authority to consider an objection that the rate of profit of an existing operator will fall as a result of the grant of a particular permit This would be an extraneous or irrelevant consideration This being the sole grievance of Kashi Prasad Gupta against the grant of permits to the three displaced operators, the Act gives him no right to object

Learned counsel for Gupta contended that his client does not object to lawful competition, but Government, by granting the displaced operators illegal permits, have subjected him to an illegal competition He claims the right to move this court under Article 226 of the Constitution of India for relief against an illegal act which subjects him to competition by rivals who have no right to run buses on that route.

Under the law this claim has no substance If there were no Article 226, Gupta would have no right enforceable against the Government or the displaced operators in a court of law He could not obtain any injunction restraining the rival competitors from carrying on his business without a permit He could not file a suit for damages against them or Government, for

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan J

any loss of income suffered by him as a result of competition from the competitor, for there is no injury to any right vested in him

Even assuming that the competition between Gupta and the displaced operators is likely to result in some reduction of the profits earned by him, this would give him no right of action It would be a case of *damnum absque injuria* Even assuming that they operated their buses on this route without a valid permit, the displaced operators have invaded no legal right of Gupta nor violated any duty owed by them to him The duty to obtain permits is to the State and not to the other operators on the same route The breach of this duty may expose the offenders to penalties of the law but not to any action for damages by a rival operator For example, if a person sells illicit liquor or smuggled gold, he can be prosecuted under the appropriate law, but is not liable in damages to any person holding a valid licence to sell liquor or gold on the ground that his illegal sales have resulted in loss of profits to the plaintiff

The loss of profits apprehended by Kashi Prasad Gupta be the result of *competition*. But by competing against him the displaced operators commit no wrongful act against him. If their permit is illegal through no fault of theirs, they are not guilty of any tortious act against Gupta, for they owed no duty to him to obtain a permit before plying their buses on this route A person who has obtained a permit and is running his own bus can have no cause of action against another for obtaining a permit to which he was not entitled

It was argued on behalf of Gupta that if the holders of valid permits are not protected against competition from persons holding no permits or illegal permits, the

State may dump any number of persons on a particular route by issuing bogus or patently illegal permits In that case, it is contended, there would be no protection against discrimination or abuse of power by the authorities I am not impressed by arguments of this sort, which presume that we are all living in a State governed by rogues or mad men under conditions of *Andher Nagari Goverganda Raja.* It is much nearer the truth to presume that the State is run by reasonable persons who may however err sometimes If in a particular case the action of the State in exempting a person from permit regulations is *mala fide* or discriminatory or unconstitutional it can be challenged under Article 14 of the Constitution—that is to say, on the ground that, the guarantee of equality before law and the equal protection of the laws has been violated The Constitution provides a remedy against abuse of power It is not Kashi Prasad Gupta's case that in offering permits to the displaced operators on this route in lieu of compensation, the State has acted *mala fide* or arbitrarily

But if there has been an irregularity or even illegality in the grant of a permit, no rival in trade can claim the right to challenge the legality of such grant on the ground that his profits in trade are likely to be reduced as a result of competition from the holder of the illegal permit, any more than he can maintain a cause of action against the State for failure to prosecute a rival offender under the Motor Vehicles Act or any other breach of the criminal law

To sum up my conclusions on this point, Kashi Prasad Gupta can show no injury or wrong to his rights The damage, if any, is non-tortious, indirect and too remote If the law will refuse relief against such loss or damage in an ordinary action. I do not think that the High Court, under Article 226 can enlarge—his

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J

rights or create a new right by modifying the principle of *damnum absque injuria* or altering the law of torts and damages.

This view is supported by judicial authority In *Tennessee Electric Power Co* v *Tennessee Valley Authority* (1) all the questions which are in issue in the present case were considered and decided by the U S Supreme Court. It was held that a person threatened with injury by an act of an agent of the Government done under statutory authority cannot challenge the validity of the statute in a suit against the agent unless the right invaded is a legal right, one of property, one arising out of a contract, one protected against tortious invasion, or one founded on a statute which confers a privilege It was further held that "a franchise to exist as a corporation and to function as a public utility, In the absence of a specific contract on the subject, creates no right to be free of competition and affords the corporation no legal cause of complaint by reason of the State's subsequently authorising another to enter and operate in the same field" It was also held : "A local franchise to operate a public utility while having elements of property, confers no contractual or property right to be free of competition either from individuals, other public utility corporations, or the State or municipality granting the franchise, in the absence of a contract precluding the grant or from initiating or permitting such competition" It was further held that "a public utility corporation has no standing to challenge the constitutionality of a statutory grant of power merely because the exercise thereof results in competition". It was also held by the U. S. Supreme Court that "State statutes requiring a public utility to obtain a certificate of convenience and necessity as a

(1) (1939) 306 U S 118-83 L. Ed. 543.

condition of doing business and subjecting it to public supervision and regulation does not give any established utility corporation a standing to maintain a suit to restrain the Tennessee Valley Authority from competing with it, at least where the Authority's activities have been specifically authorized by State law" In this case, eighteen corporations challenged the validity of the Tennessee Valley Authority Act which erected a Corporation as an instrument of the U S Government to develop by a series of dams on the Tennessee River and its tributaries a system of navigation and flood control and to sell the power created by the dams All the plaintiff companies had local franchises, licenses, or easements granted by municipalities or governmental sub-divisions but none of these franchises conferred any exclusive privilege They contended before the Supreme Court that the Tennessee Valley Authority by competing with them in the sale of electric energy was destroying their property and rights without warrant, since the claimed authorization of its transactions was an unconstitutional statute. Rejecting this argument the Supreme Court observed.

> "The pith of the complaint is the Authority's competition But the appellants realize that competition between natural persons is lawful They seek to stigmatize the Authority's present and proposed competition as 'illegal' by reliance on their franchises which they say are property protected from injury or destruction by competition. They classify the franchise in question as of two sorts, those involved in the state's grant of incorporation or of domestication and those arising from the grant by the State or its sub-divisions of the privilege to use and occupy public property and public places for the service of the public"

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J

The following further questions from the judgment are relevant:

"The appellants say that the franchise to be a public utility corporation and to function as such with incidental powers, is a species of property which is directly taken or injured by the Authority's competition They further urge that, though non-exclusive, the local franchises or easements, which grant them the privilege to serve within given municipal sub-divisions, and to occupy streets and public places, are also property which the Authority is destroying by its competition"

"The vice of the position is that neither their charters nor their local franchises involve the grant of a monopoly or render competition illegal The franchise to exist as a corporation, and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition, and affords the corporation no legal cause of complaint by reason of the State's subsequently authorizing another to enter and operate in the same field The local franchises, while having elements of property, confer no contractual or property right to be free of competition either from individuals, other public utility corporations, or the State or municipality granting the franchise The grantor may preclude itself by contract from initiating or permitting such competition, but no such contractual obligation is here asserted. The appellants further argue that even if invasion of their franchise rights does not give them standings, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition This is but to say that if the commodity used by a com-

petitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires,* that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria,* and will not support a cause of action or a right to sue "

The plaintiff companies raised the same argument which has been raised before us—namely, that any new entrant must obtain a valid permit and if he did not, businessmen already in the field could prevent him from competing with them Rejecting this argument, the Supreme Court observed

" They claim that, in any event, these laws afford them protection from the Authority's competition since any utility now seeking to serve in their territority must obtain a certificate, and hence they have standing to maintain this suit against the Authority which has none The position cannot be maintained Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of State policy. That policy is subject to alteration at the will of the legislature The declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business or thereafter embarking in it "

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J

In *Perkins* v. *Lukens Steel Co* (1) it was held by the U S Supreme Court that "Neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such"

In this case certain producers of steel challenged the legality of orders passed by Government under the Public Contractors Act under which purchases of Government supplies were made subject to the condition that the seller must agree to pay employees engaged in producing goods so purchased not less than the minimum wages as determined by the Secretary of Labour to be the prevailing minimum wages The producers who filed the suit for injunction restraining the Government from enforcing these orders, alleged that they "had been selling their products to agents of the United States for many years; they wished to continue to bid on Government contracts, their minimum wages had ranged from 53 cents to 56 cents per hour, if required to pay the $62\frac{1}{2}$ cents per hour minimum rate determined by the Secretary there was grave danger that they would be unable successfully to compete with others for Government contracts; they had a legal right to bid for Government contracts free from any obligation to abide by the minimum wage determination because of alleged illegal administrative decision of Government", and if denied the right to bid without paying their employees this minimum wage they would suffer "irreparable and irrecoverable damages" for which the law provided no "plain, adequate or complete remedy"

The Supreme Court held that the plaintiffs had no *locus standi* and observed, "We are of opinion that no legal rights of respondents were shown to have been

(1) (1940) 310 U.S. 113-84 L. Ed 1108

invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such" The court further held that these producers "to have a standing in Court must show an injury or threat to a particular right of their own", but that in this case the contested action of the officials "did not invade private rights in a manner amounting to a tortious violation"

In *Commonwealth of Massachusetts* v *Andrew Mellon* (1) the U S Supreme Court held·

> "We have no power *per se* to review and annual acts of Congress on the ground that they are unconstitutional That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue. is made to rest upon such an act The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement and not merely that he suffers in some indefinite way in common with people generally If a case for preventive relief be presented, the Court enjoins in effect, not the execution of the statute but the acts of the official, the statute notwithstanding"

In *Corporation Commission of the State of Oklahoma* v *Lowe* (2), a suit was brought by William Lowe to restrain the Corporation Commission of Oklahama from issuing a licence the Farmers Union Co-operative

(1) (1923) 262 U S 477-67 L. Ed 1078
(2) (1930) 281 U S 431-74 L Ed 945

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J.

Gin Company to construct and operate a cotton gin at Packingtown, Oklahama The plaintiff operated a cotton gin at Capitol Hill, Oklahama City, under a licence issued by the Corporation Commission, and the ground of the suit was that the issuing of a licence to the Farmers Union Co-operative Gin Company, in view of the privileges with which that company would be able to operate under the applicable statute of Oklahama, would constitute an injurious invasion of the plaintiff's business and an unreasonable discrimination against him, thus depriving him of his property without due process of law and denying him the equal protecting of the laws in violation of the 14th Amendment of the Federal Constitution The contention of the plaintiff was that under the impugned statute if a licence was given to the defendant company, it would be able to carry on its business on more favourable terms that were available to him The suit was dismissed on the ground that the plaintiff had suffered no injury which would entitle him to an injuction.

A somewhat contrary view had been taken by the U S Supreme Court in the earlier case of *Frost* v *Corporation Commission* (1), in which it was held that "a franchise to operate a public cotton gin is exclusive against one who attempts to do so without obtaining a permit, or under a void permit" Even assuming that this decision is correct—an assumption which I am not prepared to concede—the facts of that case were different. The report indicates that it was conceded by counsel for Frost in his argument that "The nature of the right possessed by appellant under its licence to operate a cotton gin is clearly distinguishable from the right possessed by the holders of a franchise to occupy streets and public places granted by the saver-

(1) (1928) 73 L Ed. 483.

eignty" The Supreme Court held, by majority, that: "Appellant having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the State acting through the Corporation Commission While the right thus acquired does not preclude the State from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights"

It is note worthy that three judges, including two who rank as the greatest among the U S. Supreme Court Judges, dissented from this view. Mr Justice BRANDIES in a considered opinion held (HOLMES and STONE JJ concurring) that no property right of Frost had been invaded and his suit must fail Mr Justice STONE held (BRANDIES and HOLMES, JJ concurring) that the grant made in favour of Frost was not an exclusive privilege

Frost's case was decided in 1938 in the heyday of "normalcy" before the Great Depression had brought home the lesson to the American Supreme Court that the right to make profit is not unlimited in content but is subject to the public interest In any case, the decision in *Frost's* case does not apply to the present case, as it was conceded by Frost's counsel that his licence to operate a cotton gin was different from the right of the holders of a franchise to occupy streets and public places Kashi Prasad Gupta's permit entitled him to use the public highway for running his motor bus, but does not confer upon him the right of exclusive use.

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J

I have already indicated that any immunity from competition enjoyed by him is the incidental result of the permit system It is not a franchise His case, is, therefore, governed by the principle laid down in *Tennessee Electric Power Company's* case

These cases were not cited at the bar but brought to the notice of the counsel during the hearing of the appeal No argument was addressed on them and learned counsel for Gupta rested his case on one or two English decisions His main argument, however, was that the right to do business is co-related to the right to make profits out of that business and a person whose profits are jeopardised by competition from the holder of an illegal permit is entitled to complain that his right guaranteed under Article 19 (1) (*g*) has been infringed. I have indicated above that this claim has no substance

Learned counsel for Gupta cited two English decisions in support of his opinion that Kashi Prasad Gupta has the status of an aggrieved person entitled to ask for a writ of *certiorari* from this Court These are *Rex* v. *Richmond Confirming Authority Ex parte Howitt* (1) and *Rex* v *Broom Ex Parte Cobold* (2) But I have already indicated that in the case before us the decision which Gupta has challenged is quasijudicial and not amendable to a writ of *certiorari* Neither resolution no. 32 nor the permit granted to the displaced operators are judicial orders. The principles governing the issue of *certiorari* under the English law do not therefore apply Gupta must invoke the special power of this Court under Article 226 of the Constitution to quash an administrative decision and before he can do this he must prove that a right vested in him has been infringed The jurisdiction under Article

(1) L R. [1920] 1 K B 248 (2) I R [1901] 2 K. B 157

226 is founded upon the existence of a right In my opinion, therefore, these decisions cannot prevail over the interpretation of the words "for any other purpose" by our own Supreme Court in *State of Orrisa* v *Madan Gopal* which is binding on this Court under Article 141 of the Constitution Even under the English law there has been no decision at least I have not come across any in which the status of an aggrieved person was conceded to a person merely on the grievance of apprehension of a fall in profits resulting from competition from another who had acquired the right to do business under the impugned permit or licence

One English decision needs consideration, though it was not cited at the bar In *Rex* v *Manchester Legal Aid Committee* (1), a person challenged the legality of a certificate for legal aid granted to a trustee in bankruptcy and prayed for a writ of *certiorari* to quash it It was held that he was a person aggrieved as "persons who had incurred the risks inherent in having to defend an action brought by a person who had been granted legal aid", had a right to question the decision The decision, even if it is correct, does not apply in *Gupta's* case before us It was held in that case that the Legal Aid Committee which had to decide whether a person was entitled to certificate for legal aid had a duty to act judicially There is no such duty as regards resolution no 32 and the grant of permits to the displaced operators in the present case Moreover, there is a difference between a litigant attacking the legality of an order which puts his opponent in the suit in a stronger position to fight him and a businessman to which he is not entitled under any law but which is merely the incidental result of the imposition of the permit system in his business I must state that I would prefer to

(1) L R [1952] 2 Q B

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J

keep open the question of the correctness of the principle laid down in this judgment For example, I would be reluctant to hold that the defendant in a suit is entitled to challenge, in the absence of any statutory provision, the correctness of a decision exempting the plaintiff from payment of court-fee I am inclined to think that in such cases the matter is between the State the litigant receiving any financial benefit either by way of exemption of court-fee or grant of legal aid

In India all the High Courts have accepted the principle that a petitioner under Article 226 must prove that he has a legal right which has been infringed In *Nirmal Chakravarti* v *Land Acquisition Officer* (1) it was held that it was not open to the beneficiaries under a trust to challenge compensation award after the trust property had been acquired In *Sisir Kumar* v *J. N Majumdar* (2), it was held that an employee who had taken the place of a dismissed employee was not entitled to challenge the setting aside of the dismissal. It was observed that the reinstatement of the dismissed employee need not necessarily affect his interests as the Bank might not terminate his services (Similarly, in the present case it cannot be argued that the entry of the displaced persons must necessarily result in reduced profits for the petitioner) In *Isar Singh* v *Union of India* (3), it was held that a displaced person has no right to challenge the validity of a certificate under section 16 of the Administration of Evacuee Property Act restoring property to the evacuee The contention of the displaced persons that they were interested in the size of the evacuee property pool from which compensation would be paid to them was not accepted

The only case I have been able to discover in which it was held that a businessman can challenge the legality

(1) A I R 1953 Cal 257 (2) A I R 1955 Cal 309
(3) A I R 1956 Punj 19.

of an order permitting another to establish a rival business in his locality is *Abdul Majid* v *State* (1) The learned single Judge who allowed petition purported to follow the principle laid down in the decision reported in (1921) 1 K B 248 But he conceded that in the English case the petitioner had a statutory right to be heard in the proceedings whereas in the case before him there was no such right The learned Judge did not specify the precise nature of the legal right or interest which entitled the petitioner to ask for the quashing of the decision entitling another business to establish a mill in his locality With profound respect, it is difficult to understand how such a person could claim any legal right or interest.

After examining a fairly large number of Indian decisions (which it is not necessary to discuss in detail) I think I can state correctly that, on the whole, there is universal acceptance of the principle that a petitioner under Article 226 must prove the existence of a specific and not a vague right before he can invoke the jurisdiction of the Court This principle is also accepted in the 14th Volume of Corpus Juris Secundum

There is another aspect of this case. Kashi Ram Gupta's attack is not limited to the permits issued to the displaced operators under section 68-G of the Act, but extends to the entire scheme under which they were "transferred" to the Gorakhpur-Gola route This scheme had the effect of "nationalising" an altogether different route with which Gupta has no concern and in which he has not even a remote or indirect interest. No bus was being run by him on that route But because, under the Scheme, three displaced persons accepted, in lieu of compensation, permits to operate their buses on the route on which Gupta's bus is running, he

(1) A I R 1957 Mad 551.

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J.

claims the right to get the entire scheme declared illegal by this Court The Court must, if his petition succeeds, invalidate a scheme merely to preserve the immunity from compensation which Gupta is enjoying on another route as an incidental result of the permit system The destruction of this scheme will upset economic plans which have been drawn up in the national interest A large part of the scheme must have been carried out already—parts of which do not effect the petitioner at all, not even his profits. This is an additional reason against the exercise of discretion by this Court

The High Court should hesitate long before passing orders under Article 226 which will upset any scheme which is a part of economic planning in the public interest, merely because a single businessman will obtain a smaller share in the increased business than he would have done but for the scheme

What does this grievance amount to, after Gupta's vague allegations which he has completely failed to substantiate have been eliminated ? Simply that he is not content with his right to make profit out of his bus but like Oliver, asks for more and wants to keep this route as a close preserve for himself and the other eleven operators.

I do not think this a fit case for interference under Article 226 even if the Court had the power to interfere. In *Veerappa Pilli* v *Raman and Raman Ltd* (1) the Supreme Court observed. "Such writs as are referred to in Article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them or there is an error apparent on

(1) A I R 1952 S C 192

the face of the record and such act, omission or excess *has resulted in manifest injustice*" (*italics mine*). In an earlier case, a Full Bench of our own Court also took the view that the power under Article 226 should be used "only in those clear cases where the rights of a person have been seriously infringed" *Indian Sugar Mills Association* v. *Secretary to Government* (1) I see little injustice, not to speak of manifest injustice to Gupta nor any infringement of his rights He has asked for a *mandamus* which cannot be granted without invalidating a State scheme concerning other routes with which he has no concern The Court must weigh the effect of any order safeguarding Gupta's great expectations of higher profits against the detriment to the public interest in upsetting this scheme *Mandamus* "may be refused where the result would be injurious and unreasonable or detrimental to the public"—*The Law of Extraordinary Legal Remedies* by Ferris, p 232

In considering the meaning and scope of the words "for any other purpose" in Article 226 this Court cannot ignore the social and economic problems which face our Republic In times of grave emergency, the English courts have not hesitated to bend the law in the national interest "A good example is *Daimler Co Ltd* v. *Continental Tyre Co, Ltd* (2) where the House of Lords severely strained the law of corporate personality in order to circumvent the control by alien enemy personal of companies registered in England"—*Law and Orders* by C K Allen, 4th Impression, page 38, Footnote Professor Allen has cited many other cases as "examples of the preservation of the true functions of our (the English) courts in times of great emergency"

India today faces an economic crisis no less grave. The very future of our Constitution, which we are

(1) A.I R 1951 All. 1 (F. B) (2) L R [1916] A. C 307.

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J.

bound in oath to preserve, is threatened by the pressure of economic forces An American Journal has thus described the grave constitutional crisis which faces India today.

> "And as the Fifties give way the Sixties the question that India faces is: Can these poor people, multiplying at the rate of 9 million a year be kept alive under a system of free parliamentary Government ? Or will India be force, in a desperate attempt to keep its masses from starving to throw aside its democratic institutions (as much of Asia already has) and adopt in their place the ruthless methods of Communist China ?" 'NEWSWEEK' Dec 14, 1959"

In this case, there is no need to "strain the law" in interpreting the scope of the words "for any other purpose". But if necessary, our Courts should not hesitate to follow the English example and should not interpret the law regardless of the economic emergency facing the nation I am not suggesting that the Court should deliberately misinterpret the law even where only one interpretation is possible. But I cannot subscribe to the view that considerations of national emergency may weigh with the House of Lords but, in India, must wait outside the gates of the High Courts The Directive Principles of State policy which are enshrined in our Constitution and have been termed as "fundamental" enjoin that the ownership and control of the material resources of the community are so distributed as best to subserve the common good and the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Whatever the words "for any other purpose" in Article 226 mean, they do not entitle any individual to hold any scheme of national development

to ransom, nor empower the High Court to hold up any scheme to preserve that individual's claim to immunity from competition—an immunity in which he has no vested interest but is incidental to a system of controls

So far I have considered Gupta's right to ask for the protection of Article 226, on the assumption that there is some basis for his apprehension that the entry of three more buses on this route is likely to intensify competition as a result of which his rate of profit will fall In view of my decision, it is not strictly necessary to inquire whether his apprehension is well founded. But, as his claim has been disputed, it is desirable that it should be decided.

Now, Kashi Prasad Gupta has placed no material before the Court to support his allegation that the route is 'uneconomic', or to show that his apprehension of a fall in the rate of his profit has any basis He could have filed his account books and profit and loss returns but did not It would have been easy for him to prove that his bus was running empty or semi-empty or never full, by giving statistics showing the average number of passengers per trip carried by his bus during the material period, both before and after the issue of permits to the three displaced operators He has not done so—not even in his rejoinder affidavit after a challenge by the State and the displaced operators to substantiate his allegations His one concrete allegation that four of the twelve buses operating on this route have to stand idle every day has been denied by the other side, and it was contended during the appeal that all the buses were running The rest of the allegations consist mainly of vague adjectives and phrases such as "uneconomic", "three were trust in", "impossible to make any respectable margin of profit", "would suffer grave

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J

and irreparable loss", "deprivation of his only source of livelihood" and so on. There is nothing in it beyond the usual complaint of a businessman who would like nothing better than being the only trader in his locality and, whenever a rival business is opened in the area, cries murder before even being hit by competition The Court is asked to presume that the mere addition of three buses on this route will lead to intensification of competition and a consequent fall in the rate of profits In my view, the Court cannot and should not make any such presumption without some evidence

Assuming, however, that competition will increase, it does not follow that this in itself will cause a fall in Gupta's rate of profit from his bus It is not necessarily against the interests of a businessman to be exposed to competition Competition increases efficiency, spurs the competing rivals to discover improved techniques and may stimulate demand Transport concerns, under the stimulus of competition, are known to have made common efforts to make the public more travel minded by such devices as advertisements popularising places of public interest and beauty spots, and otherwise promoting the cult of travel But if competition stimulates efficiency, lack of it encourages the tendency to continue in the old ruts "Why improve when I have a guaranteed income ? All I have to do is to keep out other competitors". Fear of legitimate competition worries the indolent and the lazy but not the efficient who have confidence in their own resourcefulness The stimulus of competition awakens new public demands which previously slumbered Competition is the midwife of progress in business and industry, and therefore in the public interest.

It is true that beyond a certain stage, competition becomes uneconomic. But there is no evidence that

the competition facing Kashi Prasad Gupta by the entry of the displaced operators has passed that stage. He was challenged to prove his allegation but has not cared to do so

The State and the displaced operators challenged Gupta's allegations and denied that the route is uneconomic, or that he has suffered or is likely to suffer any fall in profits Ram Avadh Misra states in his counter-affidavit that "there is enough scope of traffic on the route" otherwise he would not have agreed to take permits on it He also asserts "that there is always public demand and therefore all the stage carriages are being plied daily (Paragraph 4 of the Ram Avadh Misra's counter-affidavit) He has also given reason why he regards this route as profitable" Under the five-year plan new developments are taking place in the district including the places covered by this route and as such traffic on the route in question has considerably increased The mode of living of public has also changed and there is ever increasing percentage of travelling public and those who therefore assume that Gupta is unable to substantiate his allegation that he has suffered or is likely to suffer any loss or fall in the rate of his profits as a result of the addition of three new vehicles on this route It was argued that *prima facie,* an increase in the number of buses is likely to result in a fall in Kashi Prasad Gupta's earnings In my view no such presumption can be made when the economy of the country is expanding, its population increasing, the standard of life rising, education among the masses spreading, and the habit of travel by bus becoming quite common among the common people. *Prima facie* there is no reason to doubt the statement of the transport authorities that the number of buses was increased to meet the heavy increase in passenger traffic There are ten other buses running on this route and it can-

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J

not be said with certainty how each of them will be affected, and if so to what extent, by the addition of three buses The onus was on Gupta to disprove the State's case which he could have done easily by producing his account books or the figures of passengers transported by him during the relevant period He has kept back this information and the Court must presume that had the information been produced, it would have been unfavourable to him *Amory* v. *Delamarie.*

It was argued that even if it be the case that there has been an increase in the number of the travelling public then, *prima facie,* Gupta will obtain a smaller share in the increased business than he would have done had the respondent's buses not been on the road I do not agree Even in a rapidly expanding market the profits of a businessman will depend upon his capacity to meet the increasing demand. In the motor transport business there is limit to this capacity. Kashi Prasad Gupta's permit entitled him to run only one motor bus on this route. A bus can accommodate a limited number of passengers on a trip and make a limited number of trips in a day. It must also comply with any regulations regarding servicing or repairs Therefore, the earnings from a single bus cannot exceed a maximum limit whatever be the increase in the size of the travelling public. Now Kashi Prasad Gupta has kept back from this Court information which would have revealed whether his vehicle is already running to capacity and yielding the maximum profits This information was within his exclusive knowledge and was withheld by him even after he had been challenged to produce it. Therefore, under the law, the Court will make the maximum presumption against him and conclude that his vehicle is already running to maximum capacity and yielding him maximum profits. *Amory* v. *Dalamarie.*

In any case the court cannot presume that Gupta's vehicle would have fetched a greater share of the profits if the displaced persons buses had not been on the road

It was further argued that the fact that Gupta has thought it worth his while at some expenses to file a petition in this Court and to contest these appeals in *prima facie* proof that he is likely to suffer loss I am afraid I am unable to place such a favourable interpretation on his conduct The motive for contesting these proceedings is just likely to be that he considers this route to be lucrative and wants to keep this route as a close preserve so that he can apply for some permits in the future If he had suffered a loss he would not have kept back his account books

I therefore hold that Kashi Prasad Gupta has failed to show any basis for his alleged apprehension that the entry of the three displaced operators on the same route will intensify competition against him or that his profits are likely to fall.

On merits, I agree with the learned Chief Justice that section 68-G(2) gives the Regional Transport Authority the power to issue a permit in lieu of compensation to a displaced operator whose existing permit has been cancelled under section 68 (F) I would however like to add a few reasons of my own The Motor Vehicles Act regulates the business of carrying passengers in motor buses by the imposition of a permit system. Persons wanting to enter this business are entitled to apply for a permit under section 45 of the Act. The succeeding sections prescribe the manner of disposal of these applications and the procedure for granting permits But the point to note is that the procedure prescribed in section 47 applies to a person who has no permit or whose permit has expired. In such cases, before grant-

16 A

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J

ing a permit, the Regional Transport Authority must follow the procedure laid down in section 47, consider any representations made by classes of persons specified in that section and pay regard to several matters connected with the interest of the public generally But the procedure under that section cannot apply to a person who is to be given a permit in lieu of a cancelled permit and can claim it by right The Regional Transport Authority is bound to grant him a permit and there is nothing to "consider"

It is always open to the Legislature to change the procedure for granting permits or provide a special procedure for grant of permit to special categories of persons, provided the safeguard in the Constitution against discrimination are observed In the case of displaced operators whose permits are cancelled on the "nationalisation" of their route, the elaborate procedure under section 47 is not to be followed. By the amending Act no 100 of 1956, Parliament provided in effect that a displaced operator may be offered a permit of an alternative route and if he accepts the offer, he shall not be entitled to compensation. [Section 68-G (2)] No elaborate procedure is prescribed for the issue of a permit to such a person. He has to be offered a permit and if he accepts the offer the permit must be issued. I see nothing wrong or discriminatory in this

Learned counsel for Kashi Prasad Gupta contended that if displaced operators are offered permits in this way while other persons have to go through the elaborate procedure prescribed in Chapter IV, this would be discrimination. I do not agree. There is a vital difference ebtween a person who has no permit and applied for one and another whose permit has been cancelled and who accepts an alternative permit in lieu of compensation to which he is entitled. The former has no

vested rights whereas the latter is being deprived of a property right for which he must be compensated under the Constitution There is no discrimination in providing for a different procedure in the two cases

Section 68 G(2) enjoins that no compensation shall be payable in respect of any eixsting permit when a permit for an alternative route or area in lieu thereof has been offered to the holder of the permit and accepted by him The provision clearly excludes the application of the elaborate procedure under Chapter IV for the grant of a permit under section 68-G(2) The grant of a permit under section 47 is discretionary, whereas the Regional Transport Authority is legally bound to grant a permit under section 68-G (2) after the offer of an alternative route has been accepted by the displaced operator, and there is no discretion left with the Authority in the matter The obligation to grant a permit is enforceable under the law as the displaced operator has surrendered his right to compensation in consideration of an alternative permit. Any consideration" of such displaced operator's application for permit under section 47 must be a farce as it would be impossible for the authority to perform its duty under that section under the burden of obligation to grant a permit under section 68-G (2) It is thus clear that the duty to "consider" an application under section 47 cannot be reconciled with the obligation under section 68-G (2) to grant a permit after the offer has been accepted The two sections apply to entirely different cases.

I also agree respectfully with the view of the learned Chief Justice that the notification of 10th of January and 6th of January, 1959, under section 68-G and 68-F (2) are not invalid and further that the grant of permits in appeal no. 11 are not invalid.

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v KASHI PRASAD GUPTA

Dhavan, J

As already indicated by me, Kashi Prasad Gupta has challenged the validity of the very scheme under which the permits of the displaced operators on the nationalised route were cancelled and they were offered permits on the Gorakhpur-Gola route The challenge as on the ground that the opinion expressed in the notification that it was necessary in the public interest that certain road transport services should be operated by the State Transport Undertaking was not the opinion of the State Government The learned Chief Justice, after examining the relevant provisions, has come to the conclusion that there is not enough evidence to show whether the requisite opinion was formed by the State Government itself or by the Transport Department functioning as the State Transport Undertaking.

Now, I agree that the statute requires that the opinion under section 68-C should be that of the State Transport Undertaking and that the State Government should, under section 68-D, decide whether the scheme should be approved, with or without modifications. Where the Transport Department of the State Government is the State Transport Undertaking, the distinction between the two is somewhat fine, but it is there. The various sections are not happily worded, but the object appears to be, as the Supreme Court has held, that the person or authority which prepares the scheme under section 68-C should not sit in judgment on the merits of his or its own scheme

But I am of the opinion that the petitioner in these two writ petitions is not entitled to impugne the legality of the scheme. All the reasons which this entitle him to challenge the legality of the permits issued to the displaced operators on the Gorakhpur-Gola route apply a *fortiori*, against his claim to challenge the legality of the scheme. I have held that no legally recognisable

1960

REGIONAL TRANSPORT AUTHORITY, GORAKHPUR v. KASHI PRASAD GUPTA

Dhavan, J

right or interest of Gupta will be injured by the issue of these permits The scheme which he seeks to invalidate is even more remote from his interests, as it covers a route in which he has no interest whatsoever In my opinion, he is not entitled to challenge it.

For the reasons detailed in this judgment, I would hold that this Court has no jurisdiction to interfere in these two writ petitions and that Kashi Prasad Gupta is not entitled to ask for any relief I allow both the appeals with costs against the respondent Kashi Prasad Gupta

BY THE COURT—This appeal is allowed with costs against Sri Kashi Prasad Gupta

Appeal dismissed

APPELLATE CIVIL

*Before Mr Justice Nigam and Mr Justice Misra**

VIKARMA SINGH AND OTHERS (APPELLANTS)

v.

1960
September 1,

SRIMATI PARBATI KUNWAR AND OTHERS (RESPONDENTS)

Limitation Act, 1908, *s 22—If applicable to one who is already a party to the suit—Custom, if can vary general law—Daughter's daughter if to be excluded from inheritance—Hindu Law of Inheritance (Amendment) Act*, 1929

The appeal has arisen out of a suit instituted for damages and recovery of possession of cultivatory plots and the grove. The main points raised are firstly that Srimati Parvati Kunwar defendant applied for filing the suit as a plaintiff on 28th August, 1950, after the limitation for filing the suit was over as such her claim to recover possession of the property is barred by time, and secondly whether a custom excluding daughters would also exclude daughter's daughter from inheritance when at the time the custom grew the daughter's daughter was not an heir under the Hindu Law.

The Court after considering in detail,

Held (i) that a mere reading of s 22 of the Limitation Act indicates that the provisions of cl. (1) of this section are not intended to apply to the case of a person who is already a party to this suit and who is allowed to be transposed from a defendant to a plaintiff or *vice versa*.

(ii) that a custom has the effect of making a variation in the general law prevailing at the time when such custom comes to be recognised. In order, therefore, to deprive a party of its rights which it has under the general law, the custom must either expressly exclude him from that right or that the intention to exclude must necessarily follow by implication from the words of the proved custom.

(iii) that a custom excluding daughters from inheritance would not exclude the daughter's daughter from inheriting to the estate of her maternal grand-father when at the time the custom grew the daughter's daughter was not an heir under the Hindu Law, that is prior to the passing of the Hindu Law of Inheritance (Amendment) Act.

Case law discussed.

*Sitting at Lucknow.

1960

VIKRAMA SINGH v. SRIMATI PARBATI KUNWAR

Second Appeal no 340 of 1952, from a decree of K. N. PRASAD, Civil Judge, Rae Bareli, dated 13th September, 1960.

The facts appear in the judgment.

R N Shukla and *B N Shukla,* for appellant.

P N. Chaudhari, for respondents.

MISRA, J.:—This appeal has come before us on reference by a learned Single Judge of this Court, as in his opinion it raises a question of importance and some difficulty, touching which there is no decision and that it should, therefore, be decided by a Bench. The question posed is whether a custom excluding daughters would also exclude daughter's daughter from inheritance when at the time the custom grew, the daughter's daughter was not an heir under the Hindu Law

The appeal has arisen out of a suit instituted by respondents Hansraj Singh and Vindraban Singh for damages and recovery of possession of cultivatory plots mentioned in Annexure 'A' and the grove mentioned in Annexure 'B' to the plaint The suit was instituted against twelve defendants It was alleged in the plaint that one Jagannath Singh who was the owner of the property in suit had three daughters Smt. Ramraj Kunwar, Smt. Mainatha Kunwar and Smt. Bhoga Kunwar. That Hansraj Singh plaintiff no. 1 is the son of Smt Ramraj Kunwar, Vindraban Singh plaintiff no. 2 and Smt. Parvati Kunwar defendant no. 12 (now respondent no. 1) are the son and daughter respectively of Smt. Mainatha Kunwar and Rameshwar Bux Singh defendant no 11 (now respondent no. 4) is the son of Smt. Bhoga Kunwar Jagannath Singh died before the second settlement and on his death Smt. Bhagwani Koer, his widow, succeeded to his property as a Hindu widow for her lifetime and that on the

1960

VIKARMA SINGH v. SRIMATI PARBATI KUNWAR

Misra, J

death of Smt Bhagwani Koer which took place on 28th April, 1938, the plaintiffs and defendants nos 11 and 12 remained as the only heirs of Jagannath Singh and Smt. Bhagwani Koer. Lastly, it was alleged that defendants nos. 1 to 10 were in illegal possession over the property in suit, hence the plaintiffs were entitled to recover possession of it from defendants nos. 1 to 10. About defendants nos. 11 and 12 it was alleged that they had also right in the property but as they did not join the plaintiffs in the suit they had been arrayed as defendants and that, if they so directed defendants 11 and 12 could also join as plaintiffs and plaintiffs Hansraj Singh and Vindraban Singh would have no objection thereto. According to the plaintiffs the suit was filed in the interests of defendants nos 11 and 12 also.

The suit was contested by defendants nos 1 to 10 alone

On the pleadings of the parties the following issues were framed :

(1) Whether plaintiffs and defendants 11 and 12 are heirs of Jagannath Singh and Mst. Bhagwani Kunwar ? If so, they are entitled to inherit the entire property in suit

(2) Is there a local, tribal and family custom for exclusion of daughters, daughter's son, daughter's daughter from inheritance. If so, to what effect ?

(3) Is the suit barred by limitation ?

(4) What amount of mesne profits are plaintiffs entitled to get ?

(5) What relief, if any, are plaintiffs or any of them were entitled ?

On the evidence the trial Court and the lower appellate Court found that the property in suit did not belong

to Jagannath Singh exclusively but that it was shared half and half by him and his brother Shiva Mangal Singh. They found that Smt. Bhagwani held the share of Jagannath Singh as a life estate holder but that she had become absolute owner by being in possession of the share of Shiva Mangal Singh adversely for more than twelve years and that therefore it had become her *stridhan* and would pass to her personal heirs under the Mitakshara Law They also found that the plaintiffs and defendants nos. 11 and 12 were the grandson and grand-daughter respectively of Jagannath Singh as alleged in the plaint

Both the Courts repelled the defence contention that the suit was not within time They found on the evidence of record that Smt. Bhagwani Koer died on 28th April, 1938 and not on 5th April, 1938, as alleged by the defendants As the suit was instituted on the 24th April, 1950, they held that it was within time

The trial Court had dismissed the suit of the plaintiffs on the ground that according to the *rewaj-i-am* prevalent amongst Amethia clan of Thakurs to which Jagannath Singh belonged daughters and their issues were excluded from inheritance, hence the plaintiffs were not entitled to a decree While holding that Smt. Parvati Kunwar was under the Mitakshara Law the nearest heir to the *stridhan* property (half the share in property in suit appertaining to Mangal Singh's share) of Smt. Bhagwani Koer, no decree could be passed in her favour as she had not joined as a plaintiff It may be mentioned at this stage that Smt Parvati Kunwar had applied before the trial Court on 28th August, 1950, to be transposed as a plaintiff but her prayer was rejected on the 30th October, 1950 She, therefore, remained in the array of the defendants.

1960

VIKARMA SINGH v SRIMATI PARBATI KUNWAR

MISRA, J.

Dissatisfied with the judgment and the decree passed by the trial Court, Civil Appeal no. 76 of 1951 was filed by Hansraj Singh and Vindraban Singh and Smt. Parvati Kunwar filed a separate appeal Civil Appeal no. 75 of 1951.

In Civil Appeal no. 76 of 1951 Smt. Parvati Kunwar was arrayed as respondent no. 12. In that appeal she filed an application praying that the order passed by the trial Court rejecting her application to be transposed as a plaintiff was incorrect, that she be transposed as an appellant in that appeal under Order XLI, rules 3 and 4, Civil Procedure Code and that a decree be passed in her favour This prayer was accepted on the 17th May, 1952 and she was allowed to be transposed as an appellant in Civil Appeal no. 76 of 1951 also.

The learned Civil Julge, Rae Bareli, disposed of the two appeals together by one judgment

Disagreeing with the opinion of the trial Court the learned Civil Judge held that though the contesting defendants had succeeded in proving the *rewaj-i-am* according to which daughters and their sons were excluded from inheritance amongst the Amethia clan of Thakurs to which Jagannath Singh belonged but, in his view, the said *rewaj-i-am* did not affect the right of Smt Parvati Kunwar to inherit as an heir of Jagannath Singh under the Hindu Law of Inheritance (Amendment) Act (Act no II of 1929). As the learned Civil Judge had permitted Smt. Parvati Kunwar to be transposed as a plaintiff in the trial Court and as an appellant before him in Civil Appeal no. 76 of 1951 he held that a decree could be passed in her favour. Holding that Smt. Parvati Kunwar being the personal heir to the *stridhan* of Smt. Bhagwani and also being entitled to inherit the estate of Jagannath Singh under the aforesaid Act the lower appellate Court decreed Smt Parvati Kunwar's claim to the entire property in

suit with profits at the rate of Rs 50 per year for three years before the date of the suit and up to the date of possession from the date of the suit, in Civil Appeal no 76 of 1951. In the opinion of the lower appellate court, Civil Appeal no 75 of 1951 became infructuous, in view of the decision in Civil Appeal no. 76 of 1951 and he ordered the former to be struck off In the circumstances of the case the learned Civil Judge ordered the parties to bear their own costs in both the lower Courts

Dissatisfied with the judgment and decree passed by the learned Civil Judge, the contesting defendants or their legal representatives have come up in second appeal to this Court.

This appeal was first heard by a learned Judge of this Court but on account of the circumstances mentioned in the beginning of the judgment it has come before us.

Before coming to the main issue whether the *rewaj-i-am* pleaded in this case has the effect of excluding a daughter's daughter from inheritance, we may dispose of one other argument which has been raised on behalf of the appellants. It has been urged that Smt. Parvati Kunwar applied to be transposed as a plaintiff on 28th August, 1950, after the limitation for filing the suit was over and as such even if she now be treated as plaintiff under the orders of the lower appellate Court, her claim to recover possession of the property is barred by time. It has been mentioned above that, according to the plaintiffs and, also as found by both the lower Courts, that Smt Bhagwani Koer died on 28th April, 1938, and, as such, the contesting defendants urge that Smt Parvati's claim should be deemed to have been instituted on the 28th August, 1950, beyond twelve years from 28th April, 1938. Reliance in this connection is placed by the appellants on the

1960

VIKARMA SINGH v. SRIMATI PARBATI KUNWAR

Misra, J

provisions of section 22 of the Indian Limitation Act which runs as follows :

> " (1) Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.
>
> (2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff. "

A mere reading of this section indicates that the provisions of clause (1) of this section are not intended to apply to the case of a person who is already a party to this suit and who is allowed to be transposed from a defendant to a plaintiff or *vice versa* Smt. Parvati Kunwar was already defendant no. 12 to the original suit. In the circumstances, therefore, it cannot be said that by virtue of clause (1) of section 22 of the Indian Limitation Act, her claim would be deemed to be instituted when she is transposed as a plaintiff but that her claim shall be treated to have been instituted on the 24th April, 1938 when the suit was instituted by Hansraj Singh and Vindraban Singh We, therefore, do not agree with the argument of the learned counsel for the appellants that Smt Parvati Kunwar's claim is beyond time.

Submitting the case of the appellants on the main argument about the exclusion of a daughter's daughter from inheritance the learned Counsel has relied on the *rewaj-i-am* as proved by Exs. A-4 and A-5 and oral evidence in that behalf and also on the authority of some decided cases This *rewaj-i-am* is in the form

of questions and answers. Question no. 15 which relates to the relevant matter is as follows :

> " Agar koi malik bila aulad pisri mar gawe aur sirf dukhtar ya dukhtaran na kat khuda baqi rahen, to uska kya haq malik ke milkiyat men hai. "

The reply to the question in the *rewaj-i-am* is as below :

> ' Agar dukhtar na kat khuda howe to uska kuchh haq wa hissa nahin hai. Sirf guzara pati hain aur shadi uski shurkayan jaddi jo hissa pate hain, karte hain. "

The words 'dukhtaran na kat khuda' mean an unmarried daughter It will thus appear from the words of the *rewaj-i-am* that it was intended to exclude unmarried daughters from succession The *rewaj-i am* is completely silent about the case of married daughters or the issues of daughters. If the custom was to be inferred from the *rewaj-i-am* contained in Exs. A-4 and A-5 alone, it is doubtful whether it was intended to exclude even a daughter's son from inheritance who is a legal heir to the property of his deceased maternal grandfather under the Mitakshara Law However, in the present case, as found by both the lower Courts, on the strength of the oral evidence it has been proved that daughters and their sons could not be heirs to the property of a deceased Amethia Thakur. A custom has the effect of making a variation in the general law prevailing at the time when such custom comes to be recognized. In order, therefore, to deprive a party of its rights, which it has under the general law, the custom must either expressly exclude him from that right or that the intention to exclude must necessarily follow by implication from the words of the proved custom. The daughter's daughter was never recognized as an heir to

1960

VIKARMA SINGH v. SRIMATI PARBATI KUNWAR

MISRA, J

a deceased male owner under the Hindu Law at least in these parts of the country. It was for the first time in 1929 that by virtue of the provisions of the Hindu Law of Inheritance (Amendment) Act (Act no. II of 1929) which altered the order of succession in the Hindu Law and permitted a son's daughter, daughter's daughter, sister and sister's son to be heirs of a deceased Hindu male owner and to rank them as heirs in the specified order of succession next after a father's father and before a father's brother. The act was enacted in a reformative spirit with a view to bringing ancient rules of Hindu succession into confirmity with what are regarded as the changing conditions and sentiments of present day Hindu society. The act selected certain relatives including a daughter's daughter and gave them a preferential place in the order of succession, irrespective of their sex, over more remote relatives, on the ground that, judged by the pure test of blood relationship to the deceased owner, they are nearer heirs than those superseded by the provisions of the Act. Reference may in this connection be made with advantage to an unreported case decided by a Full Bench of the late Oudh Chief Court in First Civil Appeal no. 81 of 1936 *Dalsinger Singh* v. *Mst Jainath Kuer* in which it was held:

> "The Hindu Law of Inheritance (Amendment) Act (II of 1929) applies not only to persons who were heirs under some sub-schools of the Mitakshara but also to son's daughter, daughter's daughter, sister and sister's son, in all the provinces governed by the Mitakshara and makes them heirs in those provinces."

The *rewaj-i-am* proved in this case dates back to a time long before the year 1929. It, therefore, could

not have been intended to adversely affect the right of succession of a daughter's daughter which, as mentioned above, was recognised for the first time in 1929. The exclusion of a daughter's daughter from inheritance cannot be inferred even by necessary implication from the words of the *rewaj-i-am* quoted above. To us it appears that in the present case, but for the oral evidence which has been accepted, the *rewaj-i-am* would not exclude even a daughter's son from inheritance amongst the Amethia clan of Thakurs We, therefore, do not see any force in the argument of the learned Counsel for the appellants that the custom proved in this case would exclude Smt. Parvati Kunwar, a daughter's daughter of Jagannath Singh from inheritance to his estate.

A number of cases have been cited to support the argument that even before the passing of Act II of 1929 a daughter's daughter was recognized as an heir to a deceased male owner under the Mitakshara Law, and hence the custom proved in the case would be deemed to exclude a daughter's daughter also from inheritance by implication. Amongst the cases cited by the learned Counsel for the appellants, reliance has been mainly placed on a case reported in *Bansidhar* v *Ganeshi* (1) On the circumstances of the case, a Bench of this Court held that in the absence of preferential male heirs a daughter's daughter is heir to her maternal grandfather. In that case one Rai Singh had sold some land stipulating that if the vendee wanted to sell the property at any time he would sell it back only to Rai Singh himself for the price he had purchased it from Rai Singh and that the vendee could sell it to an outsider if Rai Singh refused to purchase the same. The vendee in contravention of this stipulation sold 1/6th of the property to a stranger On the death of Rai

(1) (1900) I L R 22 All 338

1960

VIKARMA SINGH v. SRIMATI PARBATI KUNWAR

MISRA, J.

Singh his daughter's daughter and the latter's son sued the vendee for the recovery of the share of the property which the vendee had sold to an outsider In the appeal before the High Court it appears, the counsel for the vendee conceded that in the absence of preferential male heirs the appellant Smt Ganeshi was heir to her maternal grandfather Rai Singh. The decision noted above came for discussion in a later case reported in *Jagan Nath* v *Champa and Kishen Dei* (1) where the view taken in that case was dissented from. In the latter case it was held that in the case of Hindus governed by the Mitakshara Law no females except those expressly named in the Mitakshara Law as heirs can inherit A grand-daughter therefore, cannot succeed to the estate of her grandfather. This latter view was in conformity with the opinion expressed in an earlier case decided by a Bench of this Court in *Gauri Sahai* v. *Rukko* (2) The decision in this case was affirmed by a Full Bench of the Court in the case of *Jagat Narain* v. *Sheo Das* (3) holding that according to the law of the Mitakshara none but females expressly named can inherit. The case related to the claim of a sister to succeed to the estate of a Hindu deceased and their Lordships held that as sister was not named in the list of heirs to a deceased Hindu under the Mitakshara Law, she was not entitled to succeed to the estate of the deceased The observations made regarding the right of a sister to succeed to the estate of a brother under the Mitakshara Law equally applied to a daughter's daughter because she too was not mentioned as an heir to her maternal grandfather prior to 1929 The pronouncement given in the case reported in *Bansidhar* v *Ganeshi* (4) besides being given on the admission of the parties, contains no reasons for the view that a daughter's daughter was an heir to her maternal grand-

(1) (1905) I L R 28 All. 307
(2) (1880) I L R 3 All. 45
(3) (1883) I L R 5 All 311
(4) (1900) I L R. 22 All 338.

father in the absence of preferential male heirs. As pointed out in *Jagan Nath* v. *Champa and Kishen Dei* (1), the two earlier cases that is *Gauri Sahai* v. *Rukko* (2) and *Jagat Narain* v. *Sheo Das* (3) were not brought to the notice of their Lordships when they decided the case of *Bansidhar* v. *Ganeshi* (4). In this view of the matter we held that a daughter's daughter was not an heir to the estate of the deceased maternal grandfather under the Mitakshara Law as administered in this State prior to the passing of the Hindu Law of Inheritance (Amendment) Act (Act no. II of 1929) and as such a custom which originated long before she came to be recognized as an heir will not exclude her from succession.

The learned Counsel for the appellants has again referred to a case reported to in XII Oudh Cases 63 *Sheomangal Singh* v. *Jagpal Singh* (5) and has argued that on the analogy of this case it should be decided that the custom proved in the present case should be taken as intended to exclude a daughter's daughter from inheriting to the estate of her maternal grandfather. In this case a Bench of the Court of the late Judicial Commissioner of Oudh held that the object of the Thakurs of Oudh in excluding daughters from succession being to preserve the inheritance of the land in the tribe and family to which it has belonged, the exclusion of the daughters necessarily implied the exclusion of daughter's sons as well. Their Lordships further held that where the *wajib-ul-arz* prepared at the dictation of Thakur Zamindars of the village in suit related the custom of exclusion of daughters alone, held, that it was intended to express thereby that their sons were likewise excluded with themselves.

(1) (1905) I.L.R. 28 All. 307. (2) (1880) I.L.R. 3 All. 45.
(3) (1883) I.L.R. 5 All. 311. (4) (1900) I.L.R. 22 All. 338.
(5) 12 O.C. 63.